

MARTIAL LAW IN THE INDO-PAKISTAN SUB-CONTINENT

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THESIS SUBMITTED TO THE UNIVERSITY OF LONDON
FOR THE DEGREE OF PH.D. IN SEPTEMBER, 1960.

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ACKNOWLEDGMENT

One whose wish led me to undertake the onerous task of preparing a thesis for the degree of Ph.D. is no more amidst us. The news of my father's death reached me when I was about to give him thanks for my success in obtaining the degree of LL.M. of the University of London. Today his memory gives me strength to fulfil my duties and I record my indebtedness to him. I express my sincere and deep gratitude to Professor Alan Gledhill without whose help I could hardly get on with my work. His constant supervision and valuable suggestions have all along been the chief incentive and directly contributed to the present quality of the work. Besides, Professor Gledhill's recommendations helped me to earn two scholarships, one from the School of Oriental and African Studies, the other from the British Council. I take this opportunity to thank the School authorities and the British Council for the financial assistance without which I could not accomplish the task.

I am grateful to the staffs of the Institute of Advanced Legal Studies and the library of the School of Oriental and African Studies for their courtesy and help.

London,
September, 1960.

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ABSTRACT

The necessity of considering the scope of martial law impressed me forcibly when President Iskander Mirza published his Proclamation of 7 October, 1958, abrogating the Constitution of Pakistan and declaring "martial law" throughout the country. Before considering the nature of the present regime in Pakistan, I thought it proper to inquire what had previously been regarded as the justification and scope of martial law, for without a clear conception of the foundations upon which this rests, any comments on the aspects of the present "martial rule" in Pakistan would be superficial and might be dismissed as inaccurate.

I was thus prompted to consider the origin of martial law in the Commonwealth and the United States of America, and the various meanings which have been assigned to it in these countries. To find the true limits of powers exercised by the Armed Forces when martial law is declared, it was considered necessary to discuss the extent of the executive discretionary powers exercised on less dangerous occasions, such as riot and other ordinary breaches of peace, as well as during war which demands the sacrifice of life and property of the citizen.

A consideration of the decisions of the Commonwealth and American courts and the opinions of jurists and lawyers makes it evident that the executive or military claim to assume unlimited powers has not been conceded. To allow complete freedom of action for the purpose of restoring peace and order does not necessarily confer liberty to commit any excesses. For as soon as martial law is withdrawn, every

officer is liable to criminal and civil proceedings for his acts which may be alleged to have been unnecessary or not done in good faith.

Chapter I is introductory and discusses the origin of martial law in England and the circumstances which led to the declaration in the Petition of Right, 1628, forbidding the application of martial law in England in time of peace. Chapter II relates the controversies among the judges and lawyers as to the true scope and meaning of martial law and considers whether it may be proclaimed in England today. The question whether martial law is derived from the common law power to repel force by force or from the Crown's prerogative is discussed. Chapter III deals with the application of martial law in the Commonwealth, especially in India during British rule. A few pages have been devoted to the consideration of the declaration of a "state of siege" under French constitutional law. Martial law has so frequently been applied in America by the State authorities that the whole of Chapter IV was necessary to consider the state of law in that country.

Chapter V deals with general problems which normally arise in connection with the maintenance of law and order in cases of ordinary breaches of peace. The precise limits of executive powers and the scope of judicial control have been considered in Chapters VI and VII. The exercise of war powers and the claim to uphold the Constitution under the stress of 'total war', such as the two preceding World wars required, have been considered in detail in Chapters VIII and IX.

Chapters X and XI deal exclusively with the recent application of "martial law" in Pakistan. The nature of "martial law" as now applied in Pakistan is so different from the ordinary conception of martial law that its discussion had to be postponed till the end.

The Conclusion finds its place in Chapter XII.

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CHAPTER I

THE MEANING OF "MARTIAL LAW"

1. Some Early Definitions

As an expression though not as a phenomenon "martial law" is familiar to all. But the term has been used in an off-hand manner, so that to discover its true and proper meaning one has to take particular care. As martial law is a concept of British Constitutional Law, before examining its scope and content elsewhere it will be necessary first to note the definitions assigned to it in English sources, for when considering the use of the expression in other countries, differences in meaning will be apparent.

(a) Martial Law is no law. In England, martial law has had an eventful history and as has been rightly remarked, "to unravel the knotted threads of the subject one must start a long way back".(1) Martial law, originally spelt "marshal law", the law administered in the Court of the Constable and the Marshal of England, was recognised by statute as early as the reign of Richard II, nearly the end of the fourteenth century. From the early applications of the law it is hard to reach any definite conclusions about its nature and substance. Perhaps due to its historical origin no serious attempt was made to authoritatively define it, though early efforts to describe what is

(1) Charles Fairman, Martial Rule and Insurrection, 23 Illinois Law Review 766.

martial law ill, no doubt, be discernible. Another reason for the paucity of definitions is provided by the unwillingness of the common law lawyers to characterise it as law. According to their views martial law was not properly law but something which was a negation of law. It would seem strange that no less an authority than Sir Mathew Hale described martial law as not in, in truth and reality, a law, but something indulged rather than allowed as a law; the necessity of government, order and discipline in an army only gave these laws a countenance.(2) If we accept the proposition that martial law is no law, but 'something indulged rather than allowed as law', it will be difficult to find positive principles governing its exercise. It will, in fact, be difficult to maintain that martial law is a legal concept at all. Traditionally, however, martial law has been recognised as a power vested in the Administrator by the common law or as a prerogative of the King and no student of constitutional law or history could deny its existence as a legal and factual phenomenon, since the simple fact that martial law exists has been recognised by the courts. While referring to such asseverations made by numerous English authorities which reach far

(2) Hale, History of the Common Law, p.54. Similarly, Blackstone said: "Martial law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the State and not any part of the permanent and perpetual laws of the kingdom. The necessity of order and discipline is the only thing which can give it countenance and therefore it ought not to be permitted in time of peace when the King's courts are open for all persons to receive justice according to the law of the land". Book I, p.414.

down into the nineteenth century as "martial law has no place whatsoever in this realm", "it can never be resorted to without parliamentary authorisation", "since the Stuarts it has been a totally exploded thing", "it is the most unconstitutional procedure conceivable" and similar others, Professor Corwin said that these merely befogged the issue, "for that there is such a thing as "martial law" in some sense of the term is to-day recognised by the most conservative authorities".(3)

Etymologically, martial law means the law of war, though, as has been said, originally it had nothing to do with the god of war.(4) It is, however, still recognised as one of the possible meanings of the phrase, but it is not the same in which it is generally understood by Commonwealth lawyers to-day.

To a lawyer, however, martial law means either one or all of the

(3) Edward S. Corwin, The President, p.172.

(4) Some of the Dictionary meanings approximate to this etymological sense: "Martial law - The law of war, that depends upon the just but arbitrary power and pleasure of the King, or his lieutenant; for though the King doth not make any laws but by common consent in Parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power, so that his word is a law". Blount's Law Dictionary (1670). So also in Burrell's Law Dictionary, New York edition, 1851, martial law has been defined as "a system of rules for the government of an army or adopted in times of actual war. An arbitrary kind of law or rule sometimes established in a place or district occupied or controlled by an armed force, by which the civil authority and the ordinary administration of the law are either wholly suspended or subjected to military power". Now as a matter of etymology, marshal has nothing whatever to do with martial - the marshal is the master of the horse - he is marescallus, mareschalk, a stable servant - while of course martial has to do with Mars, the god of war". - Maitland, Constitutional History of England, 266 (1926)

following - "suspension of ordinary law and the temporary government of a country or parts of it by military tribunals", (5), common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law" (6), "the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts" (7), "justification by the common law of acts done by necessity for the defence of the commonwealth when there is war within the realm" (8), "a suspension of the civil rights and the ordinary forms of trial are in abeyance" (9), "suspension of the privilege of the writ of habeas corpus" (10), or "not law in the sense of code rules, but a condition of affairs" (11).

According to Chancellor Kent, "martial law is quite a distinct thing (from ordinary military law), and is founded on paramount necessity, and is proclaimed by a military chief". (12) There is also the mischievous saying of the Duke of Wellington that martial law was neither more nor less than the will of the General who commanded the army. (13)

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- (5) A.V. Dicey, The Law of the Constitution, Tenth edition, p.287 (1959)
 - (6) Ibid. p. 288.
 - (7) Ibid. p. 291.
 - (8) Sir Frederick Pollock, What is Martial Law? 18 Law Q.R. at p.156.
 - (9) William Forsyth, Cases and Opinions on Constitutional Law, (1869)p.207.
 - (10) Halleck, International Law, Volume V, p. 501.
 - (11) Wright v. Fitzgerald, (1799) 27 State Trials 759.
 - (12) Kent, Commentaries, Volume I, p. 377.
 - (13) The Duke of Wellington's Speech in the House of Lords on April 1, 1851, quoted in Clode's Military Forces of The Crown, Vol.II, 502 - "As to the remark which had been made about him, he would say word in explanation. He contended that Martial Law was neither more nor less than the will of the General who commands the army. In fact, Martial Law meant no law at all. Therefore the General who declared Martial Law, and commanded that it should be carried into execution was bound to lay down distinctly the rules and regulations and limits according to which his will was to be carried out. Now he had, in another country, carried on Martial Law; that was to say, he had governed a large proportion of the population of a country by his own will. But then, what did he do? He declared that the country should be

It must be observed that martial law as understood in the latter sense and exercised by the commander of an army occupying foreign territory, is an element of the jus belli. (14)

(b) Martial Law - an ancient institution. A word of caution before we enter any further discussion on the nature and meaning of martial law will perhaps be necessary. Martial law is an ancient institution recognised, as already seen, quite early by English judges and legislators. The idea represented by the expression is older still, perhaps almost coeval with the emergence of the idea of the State, though for the purpose of the history and development of martial law, travelling back to such a distant point of time is not practicable, nor would it be useful. We shall, therefore, endeavour to find what martial law actually means in relatively modern times. Our concern here will be more with the doctrine of martial law than the consideration of its history and application. For, it must be appreciated that the two things are quite distinct.

governed according to its own National laws, and he carried into execution that will. He governed the country strictly by the laws of the country, and he governed it with such moderation, he must say, that political servants and Judges who at first had fled or had been expelled, afterwards consented to act under his direction. The Judges sat in the courts of law conducting their judicial business, and administering the law under his direction".

- (14) "Martial law, as exercised in any country by the commander of a foreign army, is an element of the jus belli. It is incidental to the state of solemn war, and appertains to the law of nations. The commander of the invading, occupying or conquering army rules the invaded, occupied or conquered foreign country with supreme power, limited only by international law and orders of the Sovereign or Government he serves or represents. For by the law of nations the occupatio bellica in a just war transfers the sovereign power of the enemy's country to the Conqueror. Such occupation by right of war so long as it is military only - that is, flagrante bello - will be the case put forward by the Duke of Wellington, of all the powers of government resumed in the hands of the commander-in-chief". - Cushing, viii Opinions, p. 369 (1857)

Accepting what has been said by an eminent jurist, (15) the difficulty in discerning what in substance martial law is one which faces us when considering most English institutions. It has been, we feel, rightly remarked that "the English terminology is confusing and inexact". (16) As some of the confusion is historical, the analysis will, undoubtedly, involve consideration of its application and exercise at different periods of history both in England and elsewhere. From the beginning of its known origin until it ceased to be applied in England, the term "martial law" has been used, as will be seen, in several senses. The incomplete notions of the common law jurists in England about matters comprehended in martial law and the fact that "even at a later day in England,the nature of martial law remained without accurate appreciation in Westminster Hall", (17) led to a lack of unanimity in regard to the contents of martial law. "On this subject there is no universal consensus of opinion, and the authorities are few and inconclusive". (18) Inevitably, where our efforts will fail to fix upon an invariable content so far as English law is concerned, we shall turn to other sources for a solution of the controversy as to the true scope and extent of the operation of martial law.

It must not be supposed, because martial law is an English expression, that the power to declare it is an exclusive feature of the

(15) ".....a body of law so ancient and developed in such an atmosphere, is not easy either to state or to understand". - William Holdsworth, Martial Law Historically Considered, (1902) 18 Law Q. R. 117.

(16) Keir and Lawson, Cases in Constitutional Law, 4th edition, at p. 384 (1954).

(17) Cushing, viii Opinions, p. 367 (1857)

(18) Keir and Lawson, Cases in Constitutional Law, 4th edition, p. 431.

governmental powers in England and the other members of the Commonwealth. It is one of the incidents of the sovereign power of every State. "It has been usual for all governments, during an actual rebellion to proclaim martial law or the suspension of civil jurisdiction".(19)

Under various legal systems and at different times martial law has been resorted to in circumstances less dire than a state of actual war between the two different countries. The palpable difference between its application in England and some other countries has been, as was observed, the "disposition towards which most governments are prone, to introduce too soon, to extend too far, to retain too long, so perilous a remedy".(20)

(c) Differences in application. Though laws of different countries differ as to the application and exercise of martial law, on comparing English law on the subject with the laws of other countries, some primary differences emerge. Thus, while the English jurists recognised that

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- (19) Henry Hallam, The Constitutional History of England, Volume I, ch.v, p. 240. The same points of view find expression in the following words: "Martial law exists only in time of war and originates in military necessity. It derives no authority from the civil law (using the term in its more general sense), nor assistance from the civil tribunals, for it overrules, suspends and replaces both. It is from its very nature an arbitrary power. It has been used in all countries and by all governments, and is as necessary to the sovereignty of a State as the power to declare and make war. The right to declare, apply, and enforce martial law is one of the sovereign powers and resides in the governing authority of the State whether restrictive and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence". - Halleck, International Law, Volume I, p. 499 (1878)
- (20) Ibid. p. 240.

"there may indeed, be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel the temporary abandonment of constitutional power", (21) they at the same time extolled the personal liberty of the subject whose preservation is of great importance to the public and stressed the danger that lies in its arbitrary curtailment by the executive. "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny through the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government". (22) Yet, as Stephen felt, when the State was in a real danger this might be a necessary measure.

Immediately after pronouncing in favour of depriving subjects of their liberty in cases of extreme necessity, he describes some relieving features in the British Constitution: "But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great, as to render this measure expedient: for it is the Parliament only (or legislative power) that, whenever it sees proper, by suspending the Habeas Corpus Act for a short and limited time, can enable the Crown to imprison suspected persons without the possibility of their obtaining their discharge, during that

(21) Henry Hallam, The Constitutional History of England, Volume I, Ch.V, p. 240.

(22) Stephen, Commentaries on the Laws of England, 8th edition, p. 143.

period, by any interference of the courts".(23)

Though there are other differences on this subject between English law and the laws of other countries, the differences stressed by Stephen were, no doubt, most important.(24) It may be mentioned that no Act of Parliament precedes a declaration of martial law although it is usually followed by an Act of Indemnity, when the normal administration is restored "in order to give constitutional existence to the fact of martial law".(25) But there are instances when Parliament passed statutes enabling authorities in Ireland and elsewhere to proclaim martial law. Special statutory powers were obtained conferring express powers on the military to try private citizens by the Defence of the Realm Act, 1914, as amended by the Defence of the Realm (Amendment) Act, 1915. It is true the authorities did not have to use it; still powers to set up special courts were obtained by the Emergency Powers (Defence)(No.2) Act, 1940.

Inevitable as may be the circumstances under which martial law need be proclaimed, restraint and moderation in its exercise are still preferable. Any exercise of despotic or arbitrary power must be kept

- (23) Ibid. Stephen found a parallel in the practice in ancient Rome. "As the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the Senate, which usually preceded the nomination of the magistrate, dent operam consules, ne quid respublica detrimenti capiat was called the Senatus consultum necessitus, and in like manner this experiment ought only to be tried in cases of extreme emergency: in these the nation parts with its liberty for a while, in order to preserve it for ever". Ibid.
- (24) "Martial law cannot be used in England without authority of Parliament". - Baron Comyn, Dig. Parl., H.23, quoted by Forsyth, Cases and Opinions on Constitutional Law, p. 207.
- (25) Halleck, International Law, Volume I, 499 (1878)

within proper limits; otherwise its abuse may tend to produce different and unexpected results. "But even when left unrestricted by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and as 'paramount necessity' alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and moreover, it must be governed by the rules of general public law, as applied to a state of war".(26) But as such restraint advocated on idealistic considerations may not be possible for those who are acting arbitrarily in great emergencies, Cockburn, C.J., suggested that proper restrictions should be put upon the exercise of power under martial law.(27)

2. Martial Law As Applied in England

Reference has already been made to the Court of the Constable and the Marshal from which both military and martial law originated. Though the detailed history of its workings is beyond the scope of our discussion, some critical examination of its organisation and powers will surely lead

(26) Ibid.

(27) Rex v. Nelson and Brand, Special Report, p. 75. "Let us hope that the exercise of martial law will be placed under due limitations, and its administration fenced round by the safeguards which were wisely provided by the legislature in the Act of 1833. Without these it may well be doubted whether martial law is not, under any circumstances, a greater evil than that which it is intended to prevent".

to the better understanding of the subject.(28)

(a) The Constable and Marshal's Court. The Court of the Constable and the Marshal was a part of the Curia Regis, or the Supreme Court established in England by William the Conqueror. The Constable or Comes Stabuli, or to use the modern designation, the Master of the Horse, was the commander-in-chief of the King's army and as such governed all persons and exercised jurisdiction over all offences committed in the army especially when it was on service overseas. The Court constituted by the Constable and the Marshal exercised both civil and criminal jurisdiction.

(29) Marshal or as at present spelled 'martial' law invariably meant the law administered by the King's Marshal. To it Coke referred as the "fountain of marshal law".(30) The Constable and Marshal's Court is also known in the records by its other name, the Curia Militaris, or the Court of Chivalry. The proceedings of the Constable and Marshal's Court were "not according to the course of the common law".(31)

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- (28) "In the Middle Ages martial law meant the law administered by the Court of the Constable and the Marshal. To that Court we must look for the origin both of the military and the martial law of the present day. Both these laws are the result of a development which dates from an early period in our constitutional history".
- William Holdsworth, Martial Law Historically Considered, 18 Law Quarterly Review, 117.
- (29) British Manual of Military Law, Section I, at p.4. (1958)
- (30) Coke, 4 Inst. c.17.
- (31) Henry Hallam, The Constitutional History of England, Volume I, p.240 (1881) "Towards the end of the Wars of the Roses we find very terrible powers of summary justice granted to the Constable. In 1462 Edward IV empowers him to proceed in all cases of treason, 'summarily and plainly, without noise and show of judgment on simple inspection of fact'. A similar patent was granted to Lord Rivers in 1467. They show something very like a contempt for law - the Constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts and restrictions to the contrary notwithstanding". Maitland, Constitutional History of England, 266 (1926)

The civil jurisdiction of the Constable and Marshal's Court was exercised by the Court of Chivalry which was "a court of honour, and consisted in redressing injuries of honour, and correcting encroachments on coat armour, precedence, and other distinctions of families".(32) It had also jurisdiction over disputes arising out of contracts connected with war outside the realm. Thus, in 1389 a statute whose 'vagueness is characteristic'(33) defines the jurisdiction of the court as follows: "To the Constable it pertaineth to have cognisance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other ways and customs to the same matters pertaining, which other Constables heretofore have duly and reasonably used in their time".(34)

In the exercise of its criminal jurisdiction the Constable and Marshal's Court was empowered to punish murder and other civil crimes committed by Englishmen abroad.(35) In time of war it took cognisance of "the offences and miscarriages of soldiers contrary to the law and rules of the army".(36) Whenever war was impending the King, on the advice of the Constable, used to issue orders and regulations governing the conduct of the soldiers and in course of time these rules and orders came to be known as martial law,(37) but, it may be mentioned, they would mean

(32) British Manual of Military Law, p.4, Section I (1958)

(33) 18 Law Quarterly Review 117.

(34) 13 Richard II, st.1, c.2.

(35) British Manual of Military Law, Section I, p. 4. (1958)

(36) Hale, History of the Common Law, p. 42.

(37) Ibid. "Always preparatory to an actual war, the kings of this realm, by the advice of the Constable and Marshal were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law".

military law in the modern sense.(38) Cockburn C.J. in referring to the rules and constitutions of Richard II, said:

"They form an elaborate code minute in its details to a degree that might serve as a model to anybody drawing up a code of criminal law. They follow the soldier into every department of military life and service. They point out his duties to his officers, his duties to the service, his duties to his comrades, his duties with regard to the unarmed population with whom he may come in contact. They show what would be infractions of these duties and attach specific penalties to every violation of the law so set forth".(39)

These rules were entitled as "Statutes, Ordinances and Customs to be observed in the Army". Similar ordinances and statutes were promulgated during the reigns of Henry V, Henry VII, Henry VIII and Charles I. In the reign of James II these ordinances for the due order and discipline of the army appeared under the name of "Articles of War".

With the efflux of time and along with the expansion of English dominions overseas it became necessary to undertake simultaneous military operations in different countries and, therefore, to institute at different places and times several courts on the model of the Constable and Marshal's Court. It is not definitely known, however, whether these courts exercising judicial functions and administering military law as embodied in the Articles of War acted by virtue of their office or by virtue of commissions from the Crown. As has been said, "probably the power to

(38) 18 Law Quarterly Review 122.

(39) Rex v. Nelson and Brand, Special Report, p.89.

administer such law was chiefly conferred by Commission".(40)

In 1521 the office of the High Constable as a permanent office was at an end, since from that year High Constables are never permanently appointed but for such ceremonies as the coronations and the like. The office of the Earl Marshal has, however, continued till to-day. Since 1533 the Duke of Norfolk and his male lineal descendants have been its incumbents.

(b) Royal Commissions and Proclamations. With the extinction of the office of the High Constable the administration of the military law was carried on by Commissions from the Crown authorising the commander-in-chief to issue regulations for the governance of the army and appoint himself or deputies to act as a court.(41) The courts-martial in the present form can be traced from this practice.(42) There is, however, this difference between the earlier courts and the courts-martial of the present day, that in the former the commander himself sat as the president and the courts' power was plenary and their sentences were executed without confirmation as required at present.(43)

To sum up what we have so far discussed about the Constable and Marshal's Court, it is seen to have exercised jurisdiction over three classes of persons.(44) Thus, the Court had jurisdiction over:

- (a) the soldiers of the Crown; the military law of the present day;
- (b) all citizens in time of riot or rebellion; the martial law of the present day;

(40) British Manual of Military Law, Section I, p.5 (1958)

(41) Ibid.

(42) Ibid.

(43) Ibid.

(44) 18 Law Quarterly Review 117.

(c) alien enemies.

When the Duke of Wellington referred to martial law as "neither more nor less than the will of the General who commands the army", he referred to the jurisdiction over alien enemies and had in his mind his personal experience of exercising such jurisdiction in the Peninsular War. To-day, however, the exercise of martial law in a foreign territory by the commander of the occupying forces would come under the scope of International Law. Martial law proper in Municipal law would mean the jurisdiction in times of riot or rebellion.

With the disappearance of the Constable's Court martial law in the sense it was then understood began to be administered by the Generals acting under the King's Commissions. The close association of martial law with these Commissions and their final prohibitions by the Petition of Right in 1628 renders an inquiry into their nature necessary.

These Commissions issued by the Crown expressly authorised the execution of martial law and we have already seen that the administration of military law was not much affected due to the issuing of these Commissions when the Constable's Court ceased to exist.

The Commissions were directed against two classes of offenders, namely, (1) the mutineers in the army, and (2) the rebels or enemies who were captured in war. They were usually issued to the Generals and lords-lieutenants but sometimes also to the municipal authorities who executed them also in time of peace.(45)

(45) Clode, Military Forces of the Crown, Volume I, p. 76. (1869)

An early instance of such Commissions is provided by one which in 1569 Queen Elizabeth I granted to the Earl of Sussex for suppressing the rebellion led by the Earls of Northumberland and Westmoreland. Sir George Bower, who was appointed his Provost-Marshal, toured Durham and Yorkshire and within less than three weeks executed at different places nearly 600 persons. The severity he displayed in the execution of martial law can only be favourably compared to that indulged in more recently by the court-martial set up by Governor Eyre in suppressing the Jamaica Insurrection in 1865.(46)

As the Commission themselves are self-explanatory of the system they introduced, it would seem proper to examine their terms. We shall refer to three of them. The first was issued to certain persons in 1617 and was directed for the government of Wales and the counties of Worcester, Hereford and Shropshire. It authorised the calling out the array of the county -

"As well against all and singular our enemies, as also against all and singular rebells, traytors, and other offenders and their adherents, against us our Crowne and dignite, within the said principalltie and dominions of North Wales and South Wales, the marches of the same, and counties and places aforesaid, and with the said traytors and rebells from tyme to tyme to fight and then to invade, resist, suppress, subdue, slay, kill, and put to execution of death, by all ways and

(46) On two other occasions Queen Elizabeth I issued Proclamations. In 1588 she issued a proclamation which declared that those who circulated traitorous libels or papal bulls against the Queen were to be punished by martial law. Again, during the riots in London in 1595, she granted a Commission to try and execute the rioters according to the justice of martial law.

and means, from tyme to tyme by your discretion.

"And further to doe, execute, and use against the said enemies, traytors, rebels, and such other like offenders and their adherents afore-mentioned, from tyme to tyme as necessitie shall require, by your discretion, the law called the martiall lawe according to the law martiall, and of such offenders apprehended or being brought in subjection, to save whom you shall think good to be saved, and to slay, destroye, and put to execution of death, such and as may/ of them as you shall think meete, by your good discretion, to be put to death".

The second Commission issued to Sir Robert Maunsel in 1620 empowered him to suppress piracy and gave him full powers "to execute and take away their life, or any member, in form and order of martial law".

The third example of such a Commission is provided by one issued to the Mayor of Dover and others in 1624. It recited as follows:-

"To proceed according to the Justice of Martial Law against such soldiers with any of our lists aforesaid, and other dissolute persons joining with them, or any of them, as during such time as any of our said troops or companies of soldiers shall remain or abide there, and not be transported thence, shall, within any of the places or precincts aforesaid, at any time after the publication of this our Commission, commit any robberies, felonies, mutinies, or other outrages or misdemeanours, which by the martial law should or ought to be punished with death, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such delinquents and offenders, and them cause to be executed and put to death according to the law martial, for an

example of terror to others, and to keep the rest in due awe and obedience".(47)

What was precisely meant by the "Justice of Martial Law" is not, however, easy to discern from the passage mentioned above. According to Clode, the omission was perhaps intended to be supplied by Articles of War issued by the Crown for the government of the army. There may be some truth in his contention, inasmuch as the Articles issued by the King in 1625 contained reference to the methods by which martial law was to be executed. The offences dealt with under these Articles were partly civil and partly military but they were alike punishable by the commanding officer or the marshal's court. They conferred authority "to any three or more of the Commissioners to call a Marshal Court, and sit in commission to hear, judge, and determine, any fact done by soldiers; but to have no power to put to death till they have advertised the General that shall have authority of life and death for such troops as he shall command".(48)

It will be important to mention that the Commissions were both issued and executed not in time of war but of peace. They were aimed more at the speedy punishment of any crimes committed either by soldiers or civilians associated with them than at maintaining discipline and order in the army.(49) Another distinctive feature noticed by Stephen

(47) Rymer's Foed., xviii, 254, 763, quoted by Stephen in his Opinion on the Jamaica Insurrection. Forsyth, Cases and Opinions on Constitutional Law, at p.554.

(48) Clode, Military Forces of the Crown, Volume I, p. 18 (1869)

(49) Ibid.

is that "they authorise not merely the suppression of revolts by military force, which is undoubtedly legal, but the subsequent punishment of offenders by illegal tribunals".(50) It has to be noticed that these Commissions authorised trial by martial law of men who were merely guilty of ordinary felonies.(51)

It is needless to say that such Commissions were illegal and were so held, as will be seen, by contemporary legal opinion. It has been quite often asserted that the "government may put down force by force - but when there is no rebellion, or when the rebellion is suppressed, it has no authority to direct the trial of prisoners, except in the ordinary courts and according to the known law of the land".(52)

If the legality of the Commissions and the tribunals set up under their authority were doubtful in the eyes of the lawyers of the period, it may be legitimately asked why it was not so declared by any common law court? The reasons for such discreet silence on the part of the judges might be explained by saying that as king's servant's they were reluctant to incur royal displeasure. But, as has been observed by Maitland, "past history made their position difficult and to break with it was impossible".(53) According to the old theory, the king was the fountain of all justice and the judges were his servants or deputies. When such was thought to be the constitutional position of the judges, it must have been extremely difficult for them to assert their independence and to declare royal acts to be illegal. "To hold, not that some

(50) Ibid.

(51) Maitland, Constitutional History, p.267 (1926)

(52) Ibid.

(53) Maitland, Constitutional History, p.267 (1926)

isolated act of royal authority was illegal, but that the government of the country was being regularly conducted in illegal ways - this would have been a hard feat for the king's servants and deputies".(54) In admitting the frequent use of such proclamations and commissions, Cockburn, C.J. said that, as in those times the "constitutional boundaries were not as firmly fixed and ascertained as happily they now are, the prerogative of the Crown was often attempted to be stretched beyond its proper limits by these declarations of the royal will".(55)

(c) The Petition of Right, 1628. What the court did not do the House of Commons proceeded to effect. Having been exasperated by the frequent and free use of the authority conferred by such commissions, the House of Commons first resolutely challenged the legality of these proceedings and finally declared their illegality by the celebrated Petition of Right

(54) Ibid. p. 268.

(55) Rex v. Nelson and Brand, Special Report, p.37. Coke, who was ultimately dismissed by the king, discusses these proclamations in page 74 of his Reports:- "Besides such as are issued in furtherance of the executive powers of the Crown, proclamations which either call upon the subject to fulfil some duty which he is by law bound to perform, or to abstain from any acts or conduct already prohibited by law are perfectly lawful and right; and it is said that if, after such a proclamation, the law is nevertheless broken, the disobedience of the royal command, if not of itself a misdemeanour, is at all events an aggravation of the offence. On the other hand, whenever a proclamation purports to be made in the exercise of legislative power - or if the sovereign grants a monopoly or privilege against the rights of the rest of the community, or imposes a duty to which the subject is not by law liable, or prohibits under penalties any act which is not an offence at law, or adds fresh penalties to any offence beyond those to which it is already liable, the proclamation is of no effect; for the Crown has no legislative power except such as it exercises in common with the other two branches of the legislature". Coke, then, quoted Comyns as saying:- "The king cannot by proclamation alter any part of the common law, statutes or customs of the realm". - Digest, title Prerogative D 3.

in 1628.(56) Some consideration of its scope, aims and purposes would, therefore, seem appropriate.

(56) The following is an extract from the Petition of Right containing references to Martial Law:

"Whereas also by authority of Parliament, in the 25th year of the reign of King Edward III, it is declared and enacted, That no man shall stand forejudged of life or limb against the form of the Great Charter and the laws and statutes of this realm; And by the said Great Charter and other laws and statutes of this your realm, no man ought to be adjudged to death, but by the laws established in this your realm, either by the customs of the same realm or by Acts of Parliament:

"Whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless of late, divers Commissions, under your Majesty's Great Seal, have issued forth, by which certain persons have been assigned and appointed Commissioners, with power and authority to proceed, within the land, according to the justice of Martial Law, against such soldiers and marine, or should commit any murder, robberies, felony, mutiny, or other outrage or misdemeanour whatsoever; and by such summary course and order as is agreeable to Martial Law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the Law Martial:

"By pretext whereof some of your Majesty's subjects have been, by some of the said Commissioners, put to death, when and where, if by laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed:

And also sundry grievous offenders, by colour thereof claiming and exemption, have escaped the punishment due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by Martial Law, and by authority of such Commissions as aforesaid; which Commissions and all others of like nature are wholly and directly contrary to the said laws and statutes of this your realm:

"They do therefore humbly pray your most excellent Majesty that the aforesaid Commissions for proceeding by Martial Law may be revoked and annulled; and that hereafter no Commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land".

The Petition of Right, enrolled on the statute book as 3 Car 1, c 1, was assented to by Charles I after he held some consultation with the judges. (57)

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- (57) "Before the bill was passed he (Charles I) sent for the two chief justices, Hyde and Richardson, to Whitehall, and propounded certain questions, directing that the other judges should be assembled in order to answer them. The first question was, "whether in no case whatsoever the king may not commit a subject without showing cause". To which the judges gave an answer the same day under their hands which was the next day presented to his majesty by the two chief justices, in these words: "We are of opinion, that by the general rule of law, the commitment by his majesty ought to be shown; yet some cases may require such secrecy, that the king may commit a subject without showing the cause for a convenient time. The king then delivered them a second question and required them to keep it very secret, as the former: "Whether, in case a habeas corpus be brought and a warrant from the king, without any general or special cause returned, the judges ought to deliver him before they understand the cause from the king?" Their answer was as follows: "Upon a habeas corpus brought for one committed by the king, if the cause be not specially or generally returned, so as the court may take knowledge thereof, the party ought by the general rule of law to be delivered. But if the case be such that the same requiredth secrecy, and may not presently be disclosed, the court in descretion may forbear to deliver the prisoner for a convenient time, to the end the court may be advertised of the truth thereof". On receiving this answer the king proposed a third question: "Whether, if the king grant the Commons' petition, he doth not thereby exclude himself from committing or restraining a subject for any time or cause whatsoever without showing cause?" The judges returned for answer to this important query: "Every law, after it is made, hath its exposition, and so this petition and answer must have an exposition as the case in the nature thereof shall require to stand with justice; which is to be left to the courts of justice to determine, which cannot particularly be discovered until such case shall happen. And, although the petition be granted, there is no fear of conclusion as is intimated in the question". Henry Hallam, Constitutional History, Volume I at pp. 390-91.

The statute is so called because it was not drawn in the common form of an Act of Parliament, though it has "always been regarded as having statutory force".(58) It may be mentioned that the Bill of Rights has largely superseded it.(59)

The immediate cause for the insistent demand by the House of Commons to pass the enactment was the decision in Darnel's Case (1627), well-known as The Five Knights' Case, where Hyde C.J., in deciding for the King, accepted the contention of the Attorney-General Heath that the King was justiciarius regni, all justice was derived from him and he had an absolute power to commit. The defendants were imprisoned for their refusal to pay contributions to a forced loan.(60)

The Petition of Right vigorously protested against all kinds of taxes and such-like charges "without common consent by Act of Parliament", and forbade arbitrary imprisonment, the use of commissions of martial law, the law of the Constable and Marshal in time of peace and the billeting of soldiers upon private persons.(61) The obvious reasons that inspired Parliament to enact the Petition of Right was its abhorrence of the arbitrary exercise of the royal prerogative and in declaring the commissions illegal they gave recognition to the principle that during peace time the civil magistrate had ample authority to punish any

(58) O. Hood Phillips, The Constitutional Law of Great Britain and the Commonwealth, p.41, Second Edition, (1957)

(59) Ibid.

(60) 3 St. Tr. 1.

(61) "These four grievances or abuses form the foundation of the Petition of Right, presented by the Commons in the shape of a declaratory statute". Henry Hallam, Constitutional History, Volume I, p. 389. (1881)

offenders, whether they were soldiers or ordinary citizens.(62)

That these commissions were illegal and thought to be so by the highest council in the kingdom will be evident from a little incident recorded in the reign of Queen Elizabeth I.(63) According to the views of authorities on English Constitutional Laws such commissions of martial law "were probably illegal apart from this declaration" in the Petition of Right.(64) Moreover, the Petition did not say something new. It merely re-stated the old law.(65)

- (62) "The argument against the legality of these commissions rested upon the principle, - that in time of peace the civil magistrate had cognizance of all offences committed against the public peace, and that the civil population ought not - whatever rule should be applied to the soldiers - to be subjected to Martial Law. The status of an offender was at that time a doubtful security upon which to rest his life or liberty, and therefore the Petition of Right made no distinction between the Civil and Military population, but declared these Commissions of Martial Law against any person whatsoever to be wholly and directly contrary to the laws and statutes of the realm". Clode, Military Forces of the Crown, Volume I, p. 19.
- (63) "Elizabeth, always hasty in passion and quick to punish, would have resorted to this summary course on a slighter occasion. One Peter Burchell, a fanatical puritan, and perhaps insane, conceiving that Sir Christopher Hatton was an enemy to true religion, determined to assassinate him. But by mistake he wounded instead a famous seaman, Captain Hawkins. For this ordinary crime the Queen could hardly be prevented from directing him to be tried instantly by martial law. Her Council, however, (and this it is important to observe), resisted this illegal proposition with spirit and success". (Hallam, Constitutional History, Volume I, p. 240) The Queen, it is well to remember, had a few bad precedents set up in the previous reigns and the truth is that "bad precedents always beget progeniem vitiosiore".
- (64) Wade and Phillips, Constitutional Laws, p.403, 5th edition (1955)
- (65) "The Petition of Right was in a form of a re-enactment of old law. After stating the old law which was to be re-enacted, and the manner in which it had been infringed, it prays that there may be no such infringements in future". Holdsworth, Martial Law Historically Considered, 18 Law Quarterly Review 119.

It is true, however, that since 1628 "martial law has never been attempted to be exercised in the realm of England by virtue of the prerogative"(66), but there have been a few instances when it has been applied under Parliamentary authority till it finally disappeared. We shall return later to consider whether the Petition of Right abolished martial law altogether or only made its application during peace illegal. For the present, however, we shall proceed to look into the circumstances in which martial law was enforced at least partially under the authority of Parliament.

During the Civil War in England the Long Parliament passed an Ordinance in 1644 under which "a Commission was granted to the Earl of Essex, Captain-General of the Parliamentary Forces, together with twenty-nine others of the nobility, gentry, and principal officers, "or any twelve of them", with full power to hear and determine all such causes as belong to military cognisance, according to certain articles therein set forth".(67) Quite a number of military officers were tried

(66) R.v.Nelson and Brand (1867) Special Report at p.45

(67) Article I - "No person whatever shall go from London and Westminster, or any part of the kingdom under the power of the Parliament, to hold any communication whatever, either personally, by letters, or messages, with the King, Queen, or Lords of the Council abiding with them, without consent of both Houses, or their committee for managing the war, or the Lord General or officer commanding in chief, on pain of death, or other corporal punishment at discretion.
Article 3 - "No person whatsoever, not under the power of the enemy, shall voluntarily relieve any person being in arms against the Parliament, knowing him to be so, with money, victuals, or ammunition, on pain of death, or other corporal punishment at discretion; nor shall voluntarily harbour any such, on pain of such discretionary punishment.
Article 5 - "No guardian or officer of any prison shall wilfully suffer any prisoner of war to escape, on pain of death; or negligently, on pain of imprisonment, and further punishment at discretion".
Rex v. Nelson and Brand, Special Report, p.45.

under the commission but, excepting the solitary instance of one Roger l'Estrange, no civilian was brought to trial under it. He was tried for espionage and sentenced to death, but he managed to escape. It may, however, be mentioned that espionage always comes under military cognisance.

During the Commonwealth period one Penruddock, a Wiltshire gentleman, led a revolt against Cromwell, by entering Salisbury with a small force and declaring his intention to restore the authority of the exiled King. His open act of defiance, culminating in seizing the Judge and the Sheriff, was acquiesced in by the people. The rebellion was, however, quite easily suppressed. But this little incident gave Cromwell the pretext to resort to an unprecedented exercise of arbitrary power.

Though Cromwell had perhaps every regard for government by law, becoming aware of his growing unpopularity, he utilised this opportunity in introducing measures throughout the country which might be described as the clearest violation of law and contrary to all for which Parliament had so recently fought and beheaded the King. He established what may be described as a sort of a military rule which even the autocratic Stuarts dared not do. He divided England into eleven military districts and put each under a major-general who was made responsible for the subjection of the entire people of his district. These men were violently anti-royalist and showed scant respect for any form of civil

rule.(68) The resulting repression gave the British people a lasting distaste for rule by the military.(69) To find the reasons for such strange behaviour one has to agree to what has been asserted of men who assume powers under such circumstances as Cromwell did, "To govern according to law may sometimes be an usurper's wish, but can seldom be in his power".(70)

(68) "They (the major-generals) were employed to secure the payment of a tax of ten per cent, imposed by Cromwell's arbitrary will on those who had ever sided with the King during the late wars, where their estates exceeded £100 per annum. The major-generals, in their correspondence printed among Thurloe's papers, display a rapacity and oppression beyond their master's. They complain that the number of those exempted is too great; they press for harsher measures; they incline to the unfavourable construction in every doubtful case; they dwell on the growth of malignancy and the general disaffection. It was not indeed likely to be mitigated by this unparalleled tyranny. All illusion was now gone as to the pretended benefits of the civil war. It had ended in a despotism, compared to which all the illegal practices of former kings, all that had cost Charles his life and crown, appeared as dust in the balance. For what was ship-money, a general burthen, by the side of the present decimation of a single class, whose offence had long been expiated by a composition and effaced by an act of indemnity? Or were the excessive punishments of the Star-chamber so odious as the capital executions inflicted without trial by peers, whenever it suited the usurper to erect his high court of justice? Henry Hallam, Constitutional History, Volume II, p.251.

(69) Ibid. "A sense of present evils not only excited a burning desire to live again under the ancient monarchy, but obliterated, especially in the new generation, that had no distinct remembrance of them, the apprehension of its former abuses".

(70) Ibid.

(d) The Army Regulations. It may be convenient here to make some mention, necessarily brief, of the position held by the army in England. That Parliament was much impressed by Cromwell's undisputed authority over the army is evident from the fact of his going unchallenged in his repressive measures so long as he lived, but that at the same time they cherished profound hatred against him will be shown by the exhumation and hanging of his corpse on the restoration of monarchy. Be that as it may, Parliament did not authorise a standing army since it was ever looked upon as a permanent threat against all liberty and freedom. During the reigns of Charles II and James II the army was tolerated rather than authorised by Parliament. Its refusal to authorise a standing army explains the absence of any rules for the guidance of their conduct and discipline which was, it will be recalled, enforced by means of the so-called martial law.

A word or two will be necessary to explain why Parliament reconciled itself to the idea of a standing army. James II enlisted a large standing army, the rank and file being largely Irish, and many Catholics received commissions. He lost his nerve when William III landed in the west, and went into exile, so the army never went into action, but it was put about and largely believed that James' intention was to use it to restore the Catholic faith by force. Hence the Bill of Rights, 1688, forbids the existence of a standing army, and to give legality to its existence the Army Act has to be passed annually.

Yet, at the same time Parliament felt the necessity for the installation of a body of paid soldiers to ensure the safety of the nation.

Dicey summarised the position in which the statesmen of the time found themselves and how did they get out of the difficulty which baffled solution in so many countries:

"A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary Government; and in truth the existence of permanent army has often in most countries and at times in England - notably under the Commonwealth - been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government. The belief, indeed, of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the 17th and the beginning of the 18th centuries, found themselves placed in this dilemma. With a standing army the country could not, they feared, escape from despotism; without a standing army the country could not, they were sure, avert invasion; the maintenance of national liberty appeared to involve the sacrifice of national independence".(71)

With the recognition of the necessity to maintain a standing army, Parliament began to realise that the solution lay in providing for the government and discipline of the army and the opportunity was

(71) A. V. Dicey, The Law of the Constitution, Tenth edition, p.297. (1959)

accidentally offered by the following incident. The problem that seemed so long apparently insolvable found at last an easy solution.

With the accession to the English throne by William III and Mary it was thought advisable that such of the English soldiers as were found still loyal to James II must be sent away to Holland under a Treaty of Alliance with the United Provinces. Accordingly, an order was issued to 800 men to proceed to Ipswich and from there to embark for Holland. On reaching Ipswich they mutinied and declared James II their King. There was no time for delay and leave was given in the Commons to bring in a Bill to punish mutiny and desertion for a limited time. In a little over three weeks the Bill was rushed through both Houses of Parliament and on the 3rd of April, 1689, received the Royal Assent.

Thus, under the stress of a very critical situation facing the King and Parliament an Act was passed "for punishing officers or soldiers who shall Mutiny or Desert their Majestyes Service", consisting of ten sections and prefaced by a preamble.(72) This is the first Mutiny Act whose terms

(72) The Preamble recites as follows:

"Whereas, the raising or keeping a standing Army within this kingdom in time of peace unlesse it be with consent of Parlyament is against law. And whereas it is judged necessary by their Majestyes, and this present Parlyament that dureing this time of Danger severall of the Forces which are now on foote should be continued and others raised for the safety of the kingdom for the common defence of the Protestant Religion and for the reduceing of Ireland:

"And whereas now man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the judgement of his Peeres, and according to the knowne and Established Laws of this Realme. Yet nevertheless it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stir up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall Forms will allow".

have reappeared without substantial alteration in every subsequent Mutiny Act till 1878.(73) It will be noticed that even during such an emergency as brooked no delay the members of Parliament did not forget to consider and deal with the question of the Crown's prerogative as to martial law. Thus, as will be seen from the terms of the Act, "if it conceded exceptional powers to the Crown for the punishment of soldiers on the one hand, it restrained the Crown in the exercise of the undefined prerogative of declaring Martial Law against the civil community in the other".(74) We shall return, later, to consider the effect of the Petition of Right so far as the application of martial law in England is concerned and resume for the present our discussion of the various instances when under Parliamentary authority martial law was at least partially applied; it will be seen that this was done on three different

(73) Without tracing the history of these Acts which will be beyond the scope of our work, we may shortly refer to the present position of the laws governing the soldiers. In 1879 Parliament consolidated in one statute, the Army Discipline and Regulation Act, 1879, the Mutiny Act and the Articles of War made under and deriving authority from that Act. Two years later this Act was repealed and re-enacted with necessary amendments in the Army Act of 1881. Subsequently the Army (Annual) Act was passed every year and since 1917 is called the Army and Air Force (Annual) Act. Its preamble recites the famous clause of the Bill of Rights (which enacted that "the raising or the Keeping of a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law"), and then proceeds to suspend it for another year. In 1955 two new Acts - the Army Act, 1955, and the Air Force Act, 1955, - came into force. These Acts may be operative for further periods of one year but not for a total period of more than five years, unless Parliament otherwise determines. As, however, Parliament has never been jealous of the Crown's power in relation to the Navy and Naval Discipline, the regular Naval Forces are governed by the permanent Naval Discipline Acts, 1866-19. To-day one, therefore, finds no difficulty about the laws governing the soldiers as such.

(74) Clode, Military Forces of the Crown, Volume 1, p.142. (1869)

occasions, during the rebellions of 1715, 1745 and 1780.

(e) Instances of Martial Law under Parliamentary Authority. In 1715 the government issued a Proclamation which authorised all civil and military officers to suppress the rebellion, if necessary, by force of arms. The Habeas Corpus Act was suspended and authority was granted to seize the persons of suspected persons and try the rebels in any district though the offences were not committed in such a district. There was, however, no attempt to try any persons by court-martial excepting a few half-pay officers.(75) All these extraordinary measures resorted to for the purpose of suppressing the rebellion were sanctioned by Parliament.

Almost similar measures were introduced during the rebellion in 1745. The King, on the advice of the Privy Council (Parliament being in recess), issued a Proclamation against Papists and empowered the civil magistrates to do all that was necessary to prevent any riot or disorder. Soon after when Parliament reassembled, it supported the Crown in the steps taken on its own initiative.

When troubles broke out in 1780 and on the civil magistrates refusal to attend with troops, the military was authorised to put down the riot without the help of the civil power. This, undoubtedly, was an extreme step but Lord Chancellor Thurlow sought justification for it in the following words:

"In all cases of high treason, insurrection, and rebellion within the Realm, it was the peculiar office of the Crown to use the most effectual means of resisting and quashing such insurrection and rebellion,

(75) Clode, Military Forces of the Crown, Volume II, p.163. (1869)

and punishing the instruments of it. But the King, any more than the private person, could not supersede the law, nor any act contrary to it, and therefore he was bound to take care that the means he used for putting an end to the Rebellion and Insurrection were legal and constitutional, and the Military employed for that purpose were every one of them amenable to the law, because no word of command from their particular officer, no direction from the War Office, or Order of Council, could warrant or sanction their acting illegally. In the Rebellions on 1715 and 1745 it was in their Lordships' recollection what were the measures then pursued, not but he saw he was verging towards the discussion of a situation very different from that in which the late disturbances put the metropolis, but yet their cases were alike in their respective degrees, and the late insurrection was similar to the Rebellions of 1715 and 1745, as far as it went".(76)

Though martial law on these occasions met with parliamentary approval, it was applied in a very restricted and qualified sense. The above statement of the law by the Lord Chancellor is a clear reflection of the judicial attitude and sets a limit to the exercise of arbitrary powers. Moreover, its duration was short though its necessity was great. Apart from these instances of martial law in the distant past, there has been no other occasion, excepting the two World Wars, when Parliament has armed the Executive with all necessary powers to deal with emergencies created by war.

It must be mentioned that the position as to the application and enforcement of martial law in the British colonies and possessions was

different. Doubts were expressed whether in spite of the Petition of Right 1628, martial law could be declared in those territories. Nowhere has the administration of martial law, as will be seen, led to the suspension of the constitution or the civil power, saving so far as it was required to cope with the abnormal situation.

3. Distinctions between Military and Martial Law, Military Government and Court-Martial.

To avoid further confusions, it is necessary to distinguish martial law from other similar concepts which are often associated with it, such as military law and government, and court-martial.

Military law is a body of special laws and regulations governing the Army, the Navy and the Air Force. It is applicable to the members of the aforesaid armed forces, in peace as well as in war. Citizens who enter these organisations subject themselves to its jurisdiction.(77) They are triable by military tribunals if they violate any of its provisions and cannot claim to be tried under the criminal procedure ordinarily available to civilians. "The tribunals by which this law is enforced are not a part of the judicial system, and their judgments are not subject to review under certiorari or habeas corpus by the Supreme

(77) "This Military law is a special code of rules administered by courts-martial to which the persons defined by the Army Act are subjected". W. S. Holdsworth, 18 Law Quarterly Review at 122(1902) According to Cockburn C.J., "military law as applicable to the soldier is a precise, ascertained, and well-defined law". Rex v. Nelson and Brand, Special Report, at p.86 (1867).

Court. It is not arbitrary in character but is as definite and precise as the body of law governing civilians. It does not supersede the civil laws in the sense of exempting the soldier from liability to trial and punishment in the ordinary courts".(78)

A military government is the dominion or control imposed by the conquering army on the occupied territory and its inhabitants. In Ex parte Milligan (79) Chase C.J. of the American Supreme Court described it as "military jurisdiction to be exercised by the military commander under the direction of the President, in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents".

In distinguishing between military and martial law Mr. Magoon said:

"A military government takes the place of a suspended or destroyed sovereignty, while martial law, or more properly martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains

- (78) Henry J. Fletcher, The Civilian and the War Power, (1917-18) 2 Minnesota Law Review 110 at 117. Willoughby defined military law as "the body of administrative laws created by Congress for the government of the army and navy as an organised force". The Constitutional Laws of the United States, at p.1228.
- (79) (1866) 4 Wall 2. "In the exercise of military government, the commander may adopt, for the purposes of temporary civil administration, the existing system of the country, including its laws and courts, but the jurisdiction of such laws and courts is not ex proprio vigore, but solely by virtus of the authority conferred by him. It is therefore the arbitrary will of the commander; it may be suspended, modified, or superseded at his discretion. Military government is a species of civil government existing under the sanction of the war power in the enemy's country". (1917-18) 2 Minnesota Law Review at p.119.

subject to the sovereignty. The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may rise in time of war or peace. A military government since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions".(80)

Again, martial law is different from proceedings by courts-martial. "Courts-martial are part of the recognised judicatures of the realm, whose jurisdiction is confined to the military and naval forces of the Crown".(81) Willoughby defined courts-martial as "the tribunals in which those who violate the military law are commonly tried (except where urgency demands a more summary method)"(82)

Courts which are set up to administer martial law (when it means the assumption of absolute power by the officers of the State for the suppression of insurrection and the restoration of order and lawful authority)"are not, properly speaking, courts-martial or courts at all".(83) Such courts were described by Sir James Stephen as "mere

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- (80) Magoon, Reports on the Law of Civil Government in Territories subject to Military Occupation, quoted by Willoughby in his Constitutional Laws of the United States, p.1236(1910)
- (81) William Forsyth, Cases and Opinions on Constitutional Law, p.207 (1869). In Wolton v. Gavin, 16 Q.B.61, Lord Campbell C.J. said: "None are bound by the Mutiny Acts or the Articles of War, except His Majesty's forces".
- (82) Willoughby, The Constitutional Laws of the United States, at p.1197. (1910)
- (83) William Forsyth, Cases and Opinions on Constitutional Law, (1869) Joint Opinion of Mr. Edward James and Mr. Fitz-James Stephen on Martial Law with reference to the Jamaica Insurrection, at 559.

committees formed for the purpose of carrying into execution the discretionary power assumed by the Government".(84) The members of the so-called military courts "are not obliged to proceed" according to military law, but "if they do so proceed, they are not protected by them as the members of a real court-martial might be, except in so far as such proceedings are evidence of good faith". As to the legal position of the members of such courts "they are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War".(85)

(84) Ibid. at 560.

(85) Ibid.

CHAPTER IICONTROVERSIES AS TO THE MEANING OF MARTIAL LAW1. Can the Crown declare Martial Law on apprehended danger?

Both the origin and development of martial law in England, as already seen, are so shrouded in obscurity that the difficulty of giving an unconfused account of it will be easily understood. So far we have briefly traced its growth from a common source, the Constable and Marshal's Court, which also gave birth to the military law of to-day. We may now, therefore, proceed to examine the views of some eminent persons concerning martial law and see how far they conform to the true definition of it. While considering the contents of martial law we will also discuss the claims made on behalf of the Crown to exercise it on occasions which did not, in the opinion of the constitutional lawyers, justify its application.

Bound up with their pretended claim to rule by divine right, the Tudor and Stuart kings tried to establish their absolute authority by any means available and in any direction which offered an opening for such aggrandisement. Views were early expressed that martial law could only be exercised during a time of war and resentment was apparent against subjection of ordinary citizens to the jurisdiction of the Constable's Court. In their earnest desire to be real kings and not shadows, both the Tudors and the Stuarts found many occasions to spurn such opinions

and sentiments.(1)

Their attempt to extend the powers of declaring martial law to cases of apprehended danger got judicial support in two cases, Bate's Case(2) and Rex v. Hampden(3), popularly known as The Case of Ship-money.

In Bate's Case the judgment dealt with the power of the Crown over trade, treaties, foreign affairs and indirect taxation, indicating how the Crown could turn its powers over foreign trade to fiscal uses. "All customes, be they old or new, are no other than the effects and issues of trades and commerce with forrain nations; but all commerce and affairs with forrainers, all wars and peace, all acceptance and admitting for current forrain coyn; all parties and treaties whatsoever, are made by the absolute power of the King". The decision made it clear that the King could impose duties on imported goods for regulation of trade, but not for raising revenues and his statement that the duty was imposed for such purposes was conclusive. In matters affecting the State and common benefits of the people the King's power was absolute and he could not be controlled by Parliament. Customs were an important matter of State.

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- (1) "They did not consider themselves bound by the legal definition of 'a time of war'. They considered that they might submit ordinary citizens to the jurisdiction of the Marshal or his deputies whenever in their opinion such a measure was necessary to the preservation of order. They may be said therefore to have extended this jurisdiction in two ways: (1) They extended to persons, not members of the army, powers which existed only over soldiers duly enrolled in the army; (2) they made a time of war mean a time of apprehended disturbance." William Holdsworth, Martial Law Historically Considered, 18 Law Quarterly Review 123.
- (2) (1606) 2 State Trial 371.
- (3) (1637) 3 State Trial 825.

The facts in the Case of Ship-money are well-known to every student of English Constitutional Law and history. In 1634 Charles I issued writs to all seaport towns to provide fully manned and equipped ships required for protecting English shipping. As no other town excepting London was in a position to supply those ships, "the demand was equivalent to a demand for money". In 1635, writs for ship-money were again issued, and this time to inland counties also. On getting a favourable answer from the judges who were asked to give their opinion on the legality of the writs, similar writs were issued the next year.(4) The defendant, a Buckinghamshire gentleman, refused to pay tax of £1 imposed on him. Hence proceedings were taken against him.

It was conceded on behalf of the defendant that the King had supreme power in matters relating to the defence of the country, he was the sole judge to determine whether danger existed, and he could raise money for providing him with the means to protect the country. But it was contended that before doing so the King was bound to summon

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- (4) In fairness to the unfortunate King it must be mentioned that the following opinion of the judges on the legality of the writs was obtained previous to their issue:

"We are of opinion, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your majesty may, by writ, under the Great Seal of England, command all the subjects of this your kingdom, at their charge, to provide and furnish such number of ships, with men, munition, and victuals, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril: and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, That in such case, your majesty is the sole judge, both of the danger, and when and how the same is to be prevented and avoided". Quoted by Keir and Lawson, Cases in Constitutional Law, Fourth edition, at p.51. (1954)

Parliament, for it could best judge the state of the country and as such was best qualified to burden the country.

On behalf of the Crown the argument was advanced that though it was clear law that the King could in peace time tax only with the consent of Parliament, it was otherwise in an emergency. The proposition sought to be laid down by the Court was that the King could take away property not only when war was actually raging but also on mere apprehension of war.

The majority of judges including Finch C.J. stuck to the views that the Crown had the power to proclaim martial law whenever he felt the country's defence required it and he was the sole judge of the circumstances which constituted such danger.(5)

Mr. Holborne, Hampden's counsel, represented the other view which

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- (5) Finch C.J. said: "In time of imminent danger, tempore belli, anything, and by any man, may be done; murder cannot be punished; yet, says my brother Crooke, the King cannot charge his subjects in any case without Parliament; no, not when the kingdom is actually invaded by the enemy. But truly I think, as he was the first, so he will be the last of that opinion There hath been and may be as great danger when the enemy is not discerned as when in arms and on the land. In the time of war when the course of law is stopped, when judges have no power or place, when the courts of justice can send out no process, in this case the King may charge his subjects, you grant. Mark what you grant; when there is such a confusion as no law, then the King may do it. Dato uno absurdo infinita sequunter. Then there may be a time of war in one part of the kingdom, and the courts of justice may sit. Now whether a danger be to all the kingdom or a part, they are alike perilous, and all ought to be charged Expectancy of danger, I hold, is a sufficient ground for the King to charge his subjects for if we stay till the danger comes, it will be then too late. And his averment of the danger is not traversable, it must be binding when he perceives and says there is a danger; as in 1588 the enemy had been upon us, if it has not been foreseen and provided for before it came". (1637) St. Tr. at p.1234.

insisted on the presence of actual pressing danger before the Crown could proceed by means of martial law:

"Put the case an enemy was landed, to show what the powers are by our laws in that case for defence; when there is particular appearance of instant and apparent danger, in that case particular property must yield much to necessity. These cases our books warrant, as building of bulwarks on another man's ground, and burning corn. In 1588 there was an actual danger, and then it was just to take corn or grass or anything to raise supplies. But where do any of our books say that upon fear of danger, though in the King's case, a man can without leave make a bulwark in another man's land?"(6)

It was the law of necessity, he said, that would impel not only the King but any subject to do any act upon any man's land and invade any property for the purposes of defence, if there was an instant danger or actual invasion. He went so far as to suggest that in such a case "the subject may prejudice the King himself in point of property Levis timor will not serve but such a fear as ariseth from an actual and apparent danger". (7)

The claim of the Crown to extend martial law to cover cases of apprehended disturbance was perhaps motivated by the principle that prevention is better than cure, but in spite of the views held by the majority so well propounded by Finch C.J. it may be submitted that mere expectancy of danger could not invest the Crown with additional

(6) Ibid. p.975.

(7) Ibid.

powers.(8) Judging from this standpoint the views put forward by Mr. Holborne and adopted by Crooke J. would seem to be correct.(9) It must be mentioned, however, that the Crown lawyers' attempt in the Case of Ship-money to prop up the Crown's exorbitant claim to exercise optional power of government was largely negatived by subsequent developments. Their effort also to circumvent the Petition of Right by putting a strained construction upon it would appear to be fruitless.

Even before the law was laid down in 1628 the statement of the principle that nearly approximates to it will be found embodied in the following assertion of Sir Thomas Smith, Queen Elizabeth I's Ambassador and Secretary of State. "In war time and in the field the Prince hath also absolute power, so that his word is a law. He may put to death, or to other bodily punishment, whom he shall think so to deserve, without process of law or form of judgment. This hath been sometime used within the realm before any open war, in sudden insurrections and rebellions, but that not allowed of wise and grave men, who in that their judgment had consideration of the consequence and example, as much as of the present necessity, especially when by any means the punishment might have been done by order of law. This absolute power is called

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- (8) "It is only the actual presence of pressing danger which gives to the Crown and to the subject alike the right to do what is necessary to ward off the danger". William Holdsworth, 18 Law Quarterly Review, p.125.
- (9) Per Crooke J: "Royal power, I account, is to be used in cases of necessity and imminent danger, when ordinary courses will not avail as in cases of rebellion, sudden invasion, and some other cases, where martial law may be used, and may not stay for legal proceedings". Ibid. p.1162.

Martial Law, and ever was, and necessarily must be, used in all camps and hosts of men, where the time nor place, do suffer the tarriance of pleading and process, be it never so short, and the important (quaere, importunate) necessity requireth speedy execution, that with more awe the soldier might be kept in more strait obedience, without which never captain can do anything vailable in the wars". (10) It will be seen that though Sir Thomas referred to the limitations under which the Crown could exercise such absolute power, he was mistaken as to the true nature of martial law. Like all others he included in the concept of martial law what would be known as military law to-day. The gist of his assertion that martial law could be applied to soldiers and only during war time was, however, in accordance with the prevailing notions and the spirit of the Petition of Right.

2. Was Military and Martial Law the same?

We should, however, remember that here and in subsequent reference to martial law jurisdiction over soldiers in war time also meant jurisdiction over citizens who were liable to serve as soldiers, the reason being the absence of a standing army during this period.(11) So, whenever the Constable and Marshal's Court or the Officers who received commissions to execute martial law tried to administer such law, they did not confine their jurisdiction to the soldiers only but extended it to include ordinary citizens. The same confusion has, therefore,

(10) Sir Thomas Smith, The Commonwealth of England, Book II, c.iv.(1565) quoted by Sir Frederick Pollock, 18 L.Q.R. at pp.152-3 (1902)

(11) W. S. Holdsworth, History of English Law, Volume I, p.575.

persisted in the minds of the lawyers, legislators and judges. Whatever protest was thus directed against the illegality of martial law mainly concerned itself with the time or circumstances when its applications would be legal, rather than with the persons to whom it could be applied. Further confusion arose from its common historical origin, as already seen, with military law. Gradually however, such confusion was cleared, but the process involved minute scrutiny and repeated examination over a long period.

Such legal luminaries as Hale, Coke and Blackstone were, it will not be surprising to see, unable for these reasons correctly to define martial law. According to Hale, martial law was in truth and reality not law; it was something indulged rather than allowed by law; the necessity of government, order and discipline in an army alone gave these laws countenance - quod enim necessitas, cogit defendit. Secondly, this indulged law was only to extend to members of the army or to those of the opposed army and was not intended to be executed or exercised upon those who were not enlisted in the army, for they were not bound by military constitutions applicable only to the army, governed by and subject to a different law (i.e. the common law), which remains valid even during a time of war. Finally, the exercise of martial law whereby any person should lose his life, or member, or liberty should not be permitted in time of peace when the King's courts were open for all persons to receive justice according to the laws of the land. This was, in substance, declared by the Petition of Right by which such commissions and martial law were repealed and made illegal.(12)

(12) Hale, History of the Common Law, p.54.

Evidently, what Hale has here referred to is military law, i.e., the body of rules for the internal government of land forces which at the present day is exercised by courts-martial.(13) Though at the same time his statement on martial law contains references which would indicate his familiarity with certain aspects of it. From the latter portion of his opinion it would appear that he was of opinion that, not only civilians, but also soldiers could not be tried by martial law in time of peace.

Coke and Blackstone (14) used this expression in the same sense. Probably the confusion could have been avoided if the distinction between courts-martial proper and the military courts set up under martial law were well kept in mind. When the former became established, they used to administer the Articles of War and Ordinances specially enacted to govern the conduct of soldiers in war time (15), and were 'part of the recognised judicatures of the realm, whose jurisdiction is confined to the military and naval forces of the Crown'.(16) Except soldiers no one

(13) Mr. Cushing, the Attorney-General of United States of America, criticised Hale's opinion in saying: "This proposition is a mere composite blunder, a total misapprehension of the matter. It confounds martial law and law military; it ascribes to the former the uses of the latter, it erroneously assumes that the government of a body of troops is a necessity more than that of a body of civilians or citizens. It confounds and confuses all the relations of the subject, and is an apt illustration of the incompleteness of the notions of the common law jurists of England in regard to matters not comprehended in that limited branch of the legal science". viii Opinions, p.367. It must be mentioned that in criticising Hale in the light of views developed after Hale's time, things having a common origin must be regarded as the same until their ambits become sufficiently distinct to make the difference clear.

(14) Supra,, footnote 2, chapter I.

(15) Supra, p.9, chapter I.

(16) William Forsyth, Cases and Opinions, p.208. (1869)

bound by the Articles of War or the Ordinances.(17) According to Forsyth, a want of attention to this fact produced confusion as to the true nature of martial law 'even in the minds of judges'.(18) Presumably, he was referring to the opinion expressed by Lord Loughborough C.J. in the case of Grant v. Gould.(19) It will be apparent from the views there expressed by Lord Loughborough C.J. that the meaning he ascribed to martial law contained the elements of military law as well. He said:-

"This leads me to an observation that martial law such as it is described by Hale, such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by military authority".

The learned Chief Justice in trying to define martial law has, it may be submitted, worked under the same difficulty as others before him and similarly bungled. It is true that he has shown awareness of the non-existence of martial law 'which was formerly attempted to be exercised in this kingdom'. Obviously enough, he is here referring to

(17) Per Lord Campbell C.J. in Wolton v. Gavin, 16 Q.B. 61.

(18) William Forsyth, Cases and Opinions, p. 208. (1869)

(19) (1792) 2 H.Bl.69: 126 English Reports 434.

the issue of commissions to try men in time of peace for ordinary felonies by martial law 'which was contrary to the constitution' and was, of course, forbidden by statute a century and a half earlier.(i.e., by the Petition of Right, 1628) But, towards the end of the passage, where he seems to have attempted to define martial law, he, in fact, merely refers to military law as administered by courts-martial to-day.

That the exact limit or content of martial law was not clearly known to these eminent authorities and the resulting discrepancy between their statement of the law and its exercise will, it is hoped, be apparent from our foregoing discussions. The reason of such confusion, as already observed, as perhaps due to the common historical origin of both military and martial law, but that persons like Hale, Coke, Blackstone and even Lord Loughborough failed to distinguish between military and martial law, though surprising, can only be best explained in the words of Cockburn C.J. that "they knew of no such difference, and that the distinction now supposed to exist is a thing that has come into the minds of men certainly much later than when these eminent luminaries of the law of England wrote their celebrated treatises".(20)

3. In what sense was Martial Law understood in recent times?

We have been hitherto concerned with views expressed by past authorities, but some comparatively recent opinions on martial law are,

(20) Rex v. Nelson and Brand, Special Report, pp.99-100 (1867)

it is submitted, not also wholly accurate. The statement of no less an authority than Dicey offers an example of incorrect notions regarding the true nature of martial law.(21)

Dicey refers to two senses in which the term "martial law" is generally understood, and tries to show in which sense its existence as part of English law is acceptable and in which sense it is not. If martial law means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals and which is, according to him, its proper sense, it is non-existent in England. The proclamation of martial law in this sense would be merely equivalent to ushering a state of affairs obtainable under a declaration of a "state of siege" in France and other continental countries. Under such a regime the ordinary law is suspended, the courts' jurisdiction is superseded and any man becomes liable to arrest, imprisonment or even execution at the will of the military commander. The English constitution does not recognise this kind of martial law. If there is an insurrection or rebellion, soldiers may do anything to suppress it, kill, execute or slaughter as in battle, but, as soon as the disturbance is over, they have no right under the law to inflict punishment for such riot or rebellion. If any execution takes place under the sentence of a court-martial, once such rebellion has been ended, it will be illegal and technically murder.(22) It would appear that so far Dicey truly

(21) A. V. Dicey, The Law of the Constitution, Tenth edition, at pp.287-293 (1959)

(22) Here, Dicey follows the opinion expressed by Coke, Hale and Rolfe. Thus, Coke said: "If a lieutenant, or other that hath commission of martial authority, in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for this is against Magna Carta". 3 Inst. 32.

represented the state of the law in England. His assertion that the absence of martial law in this sense shows unmistakably the supremacy of the law under the English constitution is also justifiable.

From this point of view one could find much substance in the assertion that there is no such thing as martial law in the English system of government, but, as this kind of statement might be misleading, Dicey proceeds to propound his theory of martial law.

Dicey asserts that martial law is the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or any violent resistance to the law. Though controversies exist as to whether martial law is used in exercise of the common law right of the Crown and its servants to repel force by force or in virtue of the prerogative of the Crown, we shall postpone its discussion for the present and proceed to consider his further views on the subject.

There may be some historical reasons which prompted Dicey to say that martial law "is a power which has in itself no special connection with the existence of an armed force"(23), but it will be difficult to-day for any one to suppose that martial law could be enforced without the employment of the armed forces or at least the readiness to employ them should the occasion require it. His attempt to elaborate and illustrate this point would, it appears, meet further objections.

No-one would contradict Dicey when he says that the Crown has the

(23) A. V. Dicey, The Law of the Constitution, Tenth edition, at p.288 (1959)

right to put down breaches of the peace, but when, after discussing the respective rights and duties of the soldiers and the subjects, he says: "if then by martial law be meant the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England"(24), his views become subject to criticism. With all respect due to such a high authority, it seems a matter for regret that Dicey included in the definition of martial law not only the Crown's right to suppress breaches of the peace, but also the duty of every subject, whether a civilian or a soldier, whether a servant of the government, such as a policeman, or a person in no way connected with the administration, to assist in putting down breaches of the peace. The inclusion within the scope of martial law of the duty of the subject to assist in suppressing a breach of the peace, it is submitted, is not warranted by the existing state of the law.

Though Dicey's analysis cannot thus be offered as an authoritative definition of martial law, it has to be admitted that it is not a wholly wrong conception. It will be seen that his reference to the assumption of powers by the Crown's servants to restore peace and order in case of disturbance, especially when grave and abnormal, points to the modern sense in which martial law is understood. We do not, however, dispute the duty of the citizens to render all conceivable assistance to the police or the armed forces, when required to do so in such dire

(24) Ibid. at p.290.

circumstances.

A few other opinions, the occasions for which did not arise in England but in the British possessions overseas, may now be considered, though we shall postpone the discussion of the concept of martial law among Commonwealth lawyers to a separate chapter.

In 1848 martial law was proclaimed in Ceylon and a Committee of the House of Commons was set up in the following year to inquire into the causes of the disturbances and the legality and extent of the proceedings under the aforesaid proclamation. The following opinion delivered by Sir David Dundas, the Judge Advocate-General, is, it would appear, a substantially correct approach to the problem:

"5475.- Does not martial law supersede both military and civil law? - I think it over-rides, in respect of the persons upon whom it is to operate, all other law. For instance, if five or six regiments were to mutiny in the field, would any one tell me you must apply to Parliament before you could reduce those persons to subjection? There must be somewhere, for public safety, a right to exercise such power in time of need.....

"5476.- (Sir Robert Peel) - A wise and courageous man, responsible for the safety of a colony, would take the law into his own hands, and make a law for the occasion, rather than submit to anarchy? - I think that a wise and courageous man could, if it were necessary, make a law to his own hands, but he would much rather take a law which is already made; and I believe the law of England is that a Governor, like the Crown, has inherent in him the right, when the necessity arises, of judging of it, and, being responsible for his work afterwards, so to

deal with the laws as to supersede them all and to proclaim martial law for safety of the colony. I think a good man will do it with very great care; and a prudent man too, but a wise and courageous man, I think ought not to be shy of doing it.

"5477.-- (Mr. Gladstone) -- You spoke of his being responsible for that which he has done; if he is responsible for that which he has done, does not it seem to follow that what he has done has not been done under the law so to be called, but under a necessity which is above the law? -- I say he is responsible for what he has done, just as I am responsible for shooting a man on the King's highway who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible.

"5478.-- (Mr. Adderley) -- Under martial law, would there be any difference in the treatment of a soldier and a civilian? -- I should say none; but that is a matter upon which, of course, I can have no knowledge; my notion is, that an offender ought to be subjected to the punishment of death if it be necessary, so other punishments which are fit, and that there is not any difference between a soldier offending a common man; he is an offender against the peace.(25)

About the views thus expressed by Sir David as to what is meant by the expression "martial law" Sir James Stephen said that they were substantially correct. The following cause celebre which arose in Jamaica in 1865 was the occasion for Sir James' opinions which he later

(25) Quoted in Clode's Military Forces of the Crown, Volume II, at pp. 160-61. (1869)

on included in his famous History of the Criminal Law of England. There was a revolt of the negroes against the British planters, to suppress which Governor Eyre proclaimed martial law in accordance with the provisions of a local Act. Quite unfortunately most severe measures were adopted to suppress the insurrection.(26) During this extraordinary regime a civilian, Gordon, was arrested in a district where martial law was not proclaimed, and removed to a place where it was in force. He was tried by a court-martial, found guilty of treason for inciting the negroes to rise, and was shot.

A great uproar took place in England over the incidents in Jamaica and the legality of the regime was vehemently assailed. A Parliamentary Commission which was set up to investigate the circumstances leading to the enforcement of martial law and its justifiability, sought the legal opinion of Sir James Stephen. The terms of reference were - "The Committee desires to be advised what steps are open to them to assist their fellow-subjects in Jamaica to obtain the protection of the law; and, if the law has been broken, to bring the guilty parties to justice, and also what steps are open to them, as Englishmen, to vindicate constitutional law and order, if constitutional order and law have been illegally set aside by the local Government in Jamaica".

After considering the state of law in England Sir James summed up his views on martial law in the following propositions:

"1. Martial law is the assumption by officers of the Crown of

(26) Rex v. Nelson and Brand, (1867) Special Report.

absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority.

"2. The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly and criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened".(27)

Earlier, he mentioned that the expression "martial law" was used at different times in four different senses. First, it meant "the law martial, exercised by the Constable and Marshal over troops in actual service and especially on foreign service". Secondly, the same system was attempted by several sovereigns to be introduced in time of peace to punish breaches of peace. This was declared illegal by the Petition of Right, 1628. Thirdly, the Mutiny Acts and the Army Discipline Acts, to-day called the military law, were mistakenly known as martial law. In the first sense martial law is obsolete and in the second sense it can no longer be declared in England. But the expression, as pointed out by him, "has survived and has been applied to a very different thing, namely to the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders".(28)

(27) Sir James Fitz-James Stephen, History of the Criminal Law in England, at p.215 (1883)

(28) Ibid. at pp.207-8.

It is quite apparent that what Dicey understood by martial law is not essentially different from the meaning attributed to it by Sir David and Sir James. All of them rested the legality of martial law on necessity and also favoured assumption of absolute powers by the executive if circumstances demanded it. Though these views approach nearer to the modern meaning in which martial law is commonly understood to-day, they did not go altogether without challenge. Thus, Cockburn C.J. had, apart from his criticism of the exercise of unlimited powers, objections to call the right of private defence, whether on the part of ordinary citizens or the officers of the Crown by the expression "martial law".(29) To resist an illegal application of force whether directed against any individual or lawfully constituted authority is perfectly legal and such common law right to repel force by force is undoubtedly part and parcel of the law of England. But this, he said, is not its proper sense and, therefore, it would be a serious mistake to suppose that such common law right was any part of martial law:

"It is simply the application of a universally acknowledged principle; namely, that where illegal force is resorted to for the purpose of crime, you may meet that illegal force by force, and may repress and prevent it by any amount of force that may be necessary for the purpose, even if that necessity should involve the death of the offender. If a man attacks you with intention to murder you, or to do you bodily harm; if a man stops you on the highway to rob you; if

(29) Rex v. Nelson and Brand, (1867) Special Report, at p.84.

he invades the sanctity of your dwelling by night, under circumstances calculated to inspire you with apprehension and fear, you are not bound to submit to the injury that may presently be done you, and to leave it to the law afterwards to avenge the wrong : you may at once take the law into your own hands, and in self-protection, or for the prevention of crime, kill the offender by any means in your power".(30)

Similarly, if there is a mutiny on board ship or in an army, immediate force may be applied to the extent of even killing those engaged in it. "But this is not what can properly be called martial law. It is part and parcel of the law of England - or perhaps I should say it is a right paramount to all law, and which the law of every civilised country recognises".(31)

Cockburn C.J. was, in his charge to the Grand Jury, considering the limit and extent of the authority administering martial law in Jamaica during the insurrection in 1865. He considered several opinions(32)

(30) Ibid. at p.84.

(31) Ibid. at p.85.

(32). "Martial law is arbitrary and uncertain in its nature, so much so that the term law cannot be properly applied". Or, "when martial law is proclaimed, the law is the will of the ruler, or rather the will of the ruler is law". Or, "when martial law is proclaimed, there is no rule or law by which the officers executing martial law are bound to carry on their proceedings; it is far more extensive than ordinary military law, it overrides all other law, it is entirely arbitrary". Or, "martial law is, in short, the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed and settled rules or laws, no definite practice, and not bound even by the rules of military law". - Ibid. p.22.

current in his time about the powers of the executive during any such extraordinary regime but found himself unable to accept them as sound. The immediate reason for his refusal to extend recognition to these opinions was that, excepting the authority of the persons making them, they had no real basis. In short, he considered these views not only untenable and mischievous, but even detestable. Those who were responsible for these opinions should have known that men acting on them might have to answer "civilly or criminally, for a violation of law".(33)

He could not for a moment imagine that the existing state of the law empowered the armed forces with "purely arbitrary, despotic, and capricious powers" as were set out in these opinions on the extent and limits of martial law. He did not deny that Parliament could enact that martial law should be enforced but, before doing so, it should certainly put "such restrictions and conditions on the exercise of this anomalous jurisdiction as may ensure the observance of those things which are essential to justice", and which would restrain those who in time of public commotion are "called on to administer this rude and hasty justice".(34)

Cockburn C.J. quite emphatically repudiated such extreme views about martial law which, as necessity was the only justifying factor, favoured "the exhibition of martial law in its most summary and terrible form" and setting up examples of immediate punishment. If this meant that only to inspire terror men could be sacrificed without ascertaining

(33) Ibid. at p.23.

(34) Ibid. at p.53.

whether they were guilty or innocent, it would then be very natural to expect that no court of justice would ever countenance such odious ideas. With philosophical detachment he proceeded to formulate the guiding principle in the following words:-

"There are considerations more important even than shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice, principles which can never be violated without lasting detriment to the true interest and well-being of a civilised community".(35)

In another case(36) arising out of the same disturbances in Jamaica in 1865 where proceedings were started in England against Governor Eyre for acts done under his orders, Lord Blackburn had to consider the extent of executive power during such an extraordinary regime. Enunciating the rule applicable in such circumstances, he said that the power of the officer varied according to the state of the law he would find himself in. He might have to act under the general law or particular statutes. Referring to the instant case, he pointed out that the Governor derived his powers, not only from the common law, as an Act of the local legislature also empowered him "in the event of disturbance, or emergency of any kind, to declare any particular parish, district or county of the island under martial law". What this enactment implied will be evident from the following words:-

"I think that the Legislature of Jamaica meant to enact that the

(35) Ibid. at p. 108

(36) Rex v. Eyre, (1868) Special Report 67.

commander-in-chief at the time should have very extensive power to do that which the Petition of Right had declared the Crown could not do in time of peace, and which it is doubtful whether the Crown could ever legally do in time of war; I mean, to supersede the common law altogether, and to punish all manner of offences that were there done, by summary process, not of course to give arbitrary power like that which it is said an Oriental Sovereign has, to kill men with cause or without cause, but to enable the authorities to supersede the ordinary process of law, the ordinary common law, and try all manner of things by this summary process, in order that offenders might be summarily tried and punished; the great object being to stop the invasion or insurrection".(37)

On these views on martial law it may be fairly assumed that, in its modern sense, it denotes the exercise of exceptional powers during an emergency caused either by foreign invasion or domestic rebellion. Such an extraordinary regime may lead to the total or partial substitution of military for judicial process and also to a new relationship between the civilian population and the armed forces. We may agree that martial law is "a peculiar system of legal relations which arise between the military and civilian subjects of the King in time of insurrection or civil war. It has been used to cover the assumption by military commanders of powers for the restoration of order in the event of civil war or insurrection which are not equally exercisable by the ordinary citizen".(38)

(37) Ibid, at p.77

(38) Keir and Lawson, Cases on Constitutional Law, at p.431.

We shall now pass on to a consideration of the question whether martial law exists at all in England, for the dogma that "the common law knows nothing of martial law" was persistently believed even during the first half of the nineteenth century. Such remarks as "martial law has no place whatsoever in this realm", since the time of the Stuarts it has been "a totally exploded thing", it is the "most unconstitutional procedure conceivable" and others similar were the natural outcome of the popular but uncritical belief. It will be our endeavour to find how much truth or falsehood lies behind these asseverations, "for that there is such a thing as martial law in some sense of the term is to-day recognised by the most conservative authorities".(39)

We have, of course, already discussed in which sense martial law is at present understood by English jurists and lawyers. Our purpose will be to discuss the opposing views as to the existence of martial law in England and discover the true position relating to it.

4. Does Martial Law Exist in England?

While considering Dicey's views we have seen how much strongly and emphatically he asserted that martial law was, as defined by him, assuredly part of the law of England. We also ventured to explain why the views expressed by him as to the scope of martial law were, in our respectful opinion, erroneous and suggested that a more correct approach

(39) Edward S. Corwin, The President, at p.172 (1948)

is found in the exposition of the law by Sir David Dundas and Sir James Stephen. We are now, therefore, confronted with the problem whether martial law still exists in England. We could perhaps accept Dicey's affirmative statement as to the existence of the law in the country of its origin, had we been able to adopt his definition as correct. But if martial law is what later jurists regard it as being, we should encounter some difficulty in explaining the effect of the Petition of Right, 1628.

We shall not go into the question whether martial law can be legally declared in England in time of peace for the simple reason that there is no use in denying something which nobody asserts to be true. Such eminent persons as Cockburn C.J., Holdsworth and others have been unanimous in holding that martial law would be illegal, if there was no war or conditions of war existing within the realm.(40)

It therefore remains to be seen whether martial law could be declared in England during a time of war. For two reasons it becomes difficult to reach a definite conclusion. First, the terms of the clause relating to martial law in the Petition of Right are obscure.(41) Secondly, since 1628 there has not been any case in which it was necessary to consider judicially "the limits of the powers of the prerogative in time of war".(42). The result has been that the judges,

(40) Blackburn, J., in Rex v. Eyre, Special Report, p.73, said:-
"This much, I think, I may safely say, that in time of peace the Crown has no such power". Holdsworth, History of English Law, Volume VI, p.226 (1924)

(41) "The words of the Petition of Right are obscure, and can be made to bear a wider interpretation". Halsbury's Law of England, Volume III, p.260, Third edition.

(42) Rex v. Eyre, Special Report, p.73.

when incidentally referring to the clause in the Petition of Right, have held widely differing views, though in doing so, they have merely given recognition to already existing differences of opinion as to the effect of the Petition of Right.(43)

Thus, in Rex v. Eyre(44) Lord Blackburn said that "it would be an exceedingly wrong presumption to say that the Petition of Right, in not condemning martial law in time of war, sanctioned it; still it did not in terms condemn it". According to him, therefore, Parliament did not expressly say that the Crown shall not have the power to declare martial law, but from this it does not necessarily follow that they

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- (43) Per Cockburn C.J. in Rex v. Nelson and Brand, p.66, (1867)
 "Two views have been propounded of this celebrated statute. The one that its effect is limited to commissions such as those of which the Commons had more immediate cause to complain, and especially to commissions issued in time of peace; the other that it was intended to prevent the exercise of martial law against the subject, under any circumstances, and even as against the soldier, except in the case of "armies in time of war". The latter would appear to have been the view of Lord Hale, and the words of the statute are certainly large enough to embrace the more general position; nor is it at all probable that the Commons many of whom must have foreseen that, as things were then going, armed resistance to the encroachments of the prerogative might become inevitable, intended to leave the subject, in the event of popular commotion, at the mercy of martial law".

- (44) Special Report, p.73. (1868)

"sanctioned and recognised that doing so in time of war was legal".(45)
 The judicial doubt as to whether martial law can be legally resorted to within the realm is quite apparent from the above statement.

On the other hand the observations made by Lord Halsbury as to the possible effect of the Petition of Right are, as it will be seen, opposed to the views expressed by Lord Blackburn. In Ex Parte Marais(46) Lord Halsbury, the Lord Chancellor, positively asserted that the "framers of the Petition of Right well knew that what they were doing when they made a condition of peace the ground of the illegality of unconstitutional procedure". This view goes to establish that the application of martial law would be legal within the realm, if a state of war existed.

(45) Ibid. In his opinion if they did so, it would not have been a reasonable inference at all. For, he further said, "the great statesmen as well as great lawyers at that time in Parliament were sensible enough to be aware that in fighting with the Crown at such a time they should take care that they were distinctly in the right; that there should be no doubt about the point on which they took their stand. They did not, therefore, say that Queen Elizabeth did such things at the time of the rising in the North as were illegal; it would have been very foolish of them to do that, because by attacking the Crown on such a point, they would have given the Crown a debateable ground which would have been of immense advantage to it. It may be very much doubted too, whether the Puritans, who were the great party who struggled against Charles, would have altogether sympathised with the implied attack on the Protestant Queen Elizabeth if it had been made, for the mode in which she put down the two Popish earls for the rising in the North; and they, therefore, as wise statesmen, did not take that point".

(46) 1902 A.C. 109.

Opinions among jurists are available in support of these two opposite views. Thus, an eminent writer, while referring to the proposition laid down by Lord Halsbury in the Marais case, found himself unable to accept its obvious meaning and said that it could not be "taken to mean that the framers of the Petition of Right expressly made the Petition of Right applicable only to Commissions for the execution of martial law issued by the Crown in time of peace, because no such limitation is expressed in that document".(47) According to him the Petition of Right prohibited the issue of all Commissions which had long been issued by the Crown for trying soldiers and civilians, by military or martial law. Further, he said, the whole object of the Petition was to prevent the Crown from having the power by proclamation to deal with subjects at any time by other means than by the ordinary courts, and to prevent disturbances or hostilities being made at the will of the king a reason for the issue of Commissions such as had been issued. It would seem that his approach came nearer to Lord Blackburn's.

Without expressly stating his support for Lord Halsbury's assertion, Holdsworth considered the matter from another aspect and came to the same conclusion as his. What the Petition of Right did was to declare the recent extensions of the jurisdiction of the Constable's court illegal. As a result, therefore, it "condemned the view that the court (Constable's) had under any circumstances jurisdiction over anyone within the realm in time of peace".(48) He was of opinion that the

(47) Sir Cyril Dodd, The Case of Marais, 18 Law Quarterly Review at 149.

(48) W. S. Holdsworth, History of English Law, Volume I, at p.576.

Petition of Right did not deny that the Constable's court had jurisdiction over soldiers in time of war. The fact that it was a declaratory Act and as such did not intend to abolish the legitimate jurisdiction of the Constable's court went to confirm his opinion. Further, this was also the views of the contemporary lawyers. Therefore, "the reasonable construction of the Petition was that it was exactly these extensions which it did condemn; but that it did not intend to condemn the jurisdiction admitted to belong to it by the mediaeval statutes".(49)

Hargrave, in stating his opinion as to the legality of the trial of a citizen in Ireland under martial law previous to the enactment which allowed such trial, doubted whether the extension of the jurisdiction of the Constable's Court to try ordinary citizens on the charge of rebellion would be illegal:

"Before the passing of the Act it had been open to doubt whether the prerogative of claiming and exercising martial law in time of actual rebellion, or in time of actual invasion by a foreign enemy was not merely referable to the law for governing the royal army and all connected with it (i.e., for governing those employed in defending the country against invasion and suppressing rebellion) and whether under martial law to try persons seized in rebellion or upon suspicion of being rebels before a court-martial constituted by the King's authority and punish them by death, or otherwise at the discretion of such a court, was not an extension of martial law beyond its real object, and an infringement

(49) Ibid.

of the law of England, in a point of most serious character".(50)

According to him, therefore, the Act(51) sanctioning the exercise of martial law powers to suppress the Irish rebellion should not have been passed, or if it was deemed essential to enact such laws, at least the extraordinarily harsh latitude allowed by the Act should have been avoided. He could not but wholeheartedly regret that the provisions of the Irish statute, enacted in "the heated atmosphere of civil commotions in Ireland", were, after the Union of Great Britain and Ireland, incorporated in an Act of the United Kingdom Parliament.(52) Judging from "previously settled notions" these statutes merely amounted "to a melancholy change".

Leaving aside these speculations about the intended effect of the Petition of Right which would seem to be academic and therefore, devoid of any great practical interest (for it may be recalled that martial law has not been proclaimed in the United Kingdom during the last three centuries), we may proceed to consider the present law which would govern a situation both grave and abnormal and thus requiring the intervention by the military arm of the State. To assert that, in view of the Petition of Right, the executive government in the United Kingdom has no effective power in its hands to deal with any emergency caused either by rebellion within the realm (which to-day nobody supposes to be probable) or invasion would be surely against common sense. As a matter

(50) William Forsyth, Cases and Opinions on Constitutional Law, 189, (1869)

(51) 39 George III, c.3.

(52) 41 George III, c.15.

of fact it will be seen that at the beginning of this century as well as quite recently, during the two World Wars, the United Kingdom Parliament passed enactments giving the executive necessary powers to meet the emergency. There may be some controversies as to whether the enforcement, for example, of the Defence of the Realm Act, 1914-1915 and Emergency Powers (Defence) Acts, 1939-1940, virtually amounted to an application of martial law, but it is established beyond any doubt that the Armed Forces may be legally empowered under any grave emergency by an Act of Parliament to render such assistance as may be deemed essential to ensure the restoration of order. As the aforesaid Acts quite amply illustrate the method and manner by which the United Kingdom Parliament intended to cope with such emergencies, it is thought fit to consider them in some details. But before doing so it may be necessary, since we have been referring so long to the various senses in which martial law has been used and understood by different people, to indicate in which sense it exists in the English system of government. In the sense that, during an invasion or rebellion or riot or in expectation thereof, the executive government in England may assume exceptional powers, one can say that martial law exists in this country.(53) "Martial law" in this sense only means the common law right of the Crown and its servants to repel force by force and to take any such measures as may be necessary and expedient for restoring peace and order.

(53) A. V. Dicey, The Law of the Constitution, Tenth edition, at p.290, (1959)

During the First World War, the Defence of the Realm Act, 1914, was passed to meet the national emergency caused by the declaration of war against Germany. Parliament conferred on the Government both legislative and executive powers 'for securing the public safety and the defence of the realm'. Some twenty days later, on August 28, an amending Act was passed which empowered to 'provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making bye-laws, or any other power under the Defence Acts, 1842-1875, or the Military Lands Acts, 1891 to 1903'. On November, 1914, the Defence of the Realm (Consolidation) Act was passed which gave His Majesty in Council the power to make regulations, and provided inter alia that offenders should be tried and punished by courts-martial for breaches of such regulations. Objections were raised against conferment of such powers which would treat ordinary citizens as if they were subject to military law. As a result, the Defence of the Realm (Amendment) Act, 1915, was passed which authorised civil courts to try breaches of the aforesaid regulations. It further provided that in the event of actual invasion or any special military emergency, His Majesty in Council might, by Proclamation, suspend, generally or in specified areas, the jurisdiction of the civil courts.

Though the public realised the gravity of the war crisis and was willing to submit to the necessities arising out of war, they could hardly imagine the extent of government control. "In the succeeding years the country was to learn, as never before, the unsuspected lengths

to which uncontrolled executive legislation and action could be carried".(54)

In the cases involving the interpretation of these Acts "some great constitutional battles were fought and some great constitutional principles asserted", which we shall discuss while considering the scope of judicial review of war power.(55)

Prior to the outbreak of war in 1939, the Emergency Powers (Defence) Act, 1939, was enacted which empowered His Majesty in Council to make such Defence Regulations "as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community".

The Emergency Powers (Defence) Act, 1940, allowed Defence Regulations issued under the Act of 1939, to make provision "for requiring persons to place themselves, their services, and their property at the disposal of His Majesty".

The Emergency Powers (Defence) (No.2) Act, 1940, passed a few months later, provided that "for securing, that , where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary Courts, persons, whether or not subject to the Naval Discipline Act, to military law, or to the Air Force Act, may be tried by such Special courts, not

(54) Sir C. K. Allen, Law and Orders, (1956) at p.41.

(55) Chapters - VIII and IX.

being courts-martial, as may be so provided". But it must be mentioned that "these Special Courts, which never in fact operated, were essentially civilian courts and were in no sense military courts or courts-martial. Even the Treachery Act, 1940, Section 2, which did confer on courts-martial jurisdiction to try enemy aliens for offences against that Act, provided that this jurisdiction should be exercised only by the direction and with the consent of the Attorney-General".(56)

5. Is a declaration of martial law within the prerogative powers of the Crown, or is it a common law power?

Some controversy arises as to whether, in cases of extreme necessity and imminent danger, the right to declare martial law is part of the Crown's prerogative or based on the right of rulers and subjects alike to use necessary force in protection of life or property. "Since, however, the separation of military law from martial law took place, the latter term, has been applied to something quite different - namely, the law of necessity promulgated by the Crown in case of domestic danger arising from foreign invasion or native insurrection to which both civilians and soldiers are equally subject, and which is enforced by military authority. The possible existence of such a state of things in British dominions has been repeatedly recognised by statute; but it has been strongly contested between writers on constitutional law and

(56) British Manual of Military Law, Part I, Section I, at p.6.(1956)

military law whether it is a part of ordinary law or not".(57)

Facts and arguments can be set out in support of both views, and it is difficult to choose between them.

The jurisdiction once exercised by the Court of the Constable and Marshal was part of the Crown's prerogative to govern both soldiers and subjects in time of war and Holdsworth says that "that prerogative had never been taken away; it still existed".(58) The preambles and recitals in some Irish statutes regulating the statutory exercise of martial law in Ireland contain references to resort to martial law for the sake of public safety.(59)

Writers on military law such as MacArthur, Clode, Hough and Simmons consistently took the view that the Crown had a prerogative right to declare martial law and execute it in British dominions in the event of invasion or domestic rebellion. Sir David Dundas, Judge Advocate-General, also stated that the Irish Act (39 George III, 3) was a "plain recognition of the prerogative of the Crown to declare martial law." The Act is only a confirmation of the authority the Crown already possessed and shows that it would, whenever there was the opportunity, come to Parliament for conferment of such powers in

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- (57) G. G. Phillimore, Martial Law in Rebellion, The Journal of the Society of Comparative Legislation, April 1900, p.50.
 (58) Martial Law Historically Considered, 18 Law Quarterly Review, p.126.
 (59) 39 George III, c.11, mentions in the preamble "the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law", and the same Act provides that "nothing in the Act contained shall be construed to take away, abridge, or diminish the acknowledged prerogative of His Majesty for the public safety to resort to the exercise of martial law". Similarly 43 George III, c.117, has references to his "undoubted prerogative".

order to proceed according to law. But an emergency might suddenly arise in which there would be no time for asking such powers from the legislature and the executive would have to act instantly if the constitutional government was to be maintained. What should the executive do in such circumstances? Sir David said, "it is the duty of the executive, and there is royal authority to do so at home and abroad" to decide for itself and effectively deal with the situation.(60)

We have already discussed the views of such eminent authorities as Dicey, Lord Loughborough and Stephen and others which hold that martial law is merely part of the common law right of rulers and subjects to repel force by force for the safety of the kingdom. Cockburn, C.J. who, as we have seen, characterised martial law as a "shadowy, uncertain, precarious something, depending entirely on the conscience or rather on the despotic and arbitrary will of those who administer it" definitely held that it was nothing more nor less than the application of the common law principle by which "life may be protected and crime prevented by the immediate application of any amount of force which, under the circumstances, may be necessary".(61)

Whichever of these two views as to the source from which the jurisdiction to proclaim and enforce martial law has been derived, be correct, the law, it has been asserted, "acts on the same principles in judging the conduct of those who have acted under a proclamation of

(60) Clode, Military Forces of the Crown, Volume II, at p.160 (1869)
 (61) Rex v. Nelson and Brand, (1868) Special Report, p.85.

martial law".(62) Both views would, however, require as condition precedent of a proclamation of martial law a state of affairs which would absolutely demand the immediate use of force.(63)

(62) Martial Law Historically Considered, 18 Law Quarterly Review, at 129.

(63) Ibid. at p.128.

CHAPTER 3MARTIAL LAW IN THE COMMONWEALTH1. Preliminary Observations

Our problem till now has been to determine the meaning of the expression "martial law" as understood in English constitutional law. It would seem proper to examine the experience of other peoples, particularly in the British colonies and dominions, France and the United States of America, in order to get a clearer view of the basic nature of martial law.

The sense in which martial law has been applied in the Commonwealth is not widely different from its English sense, though doubts have been expressed whether the British Crown had, in view of the provisions of the Petition of Right, the power to declare martial law outside England. "Whatever power the Crown possesses in this respect in the United Kingdom, it possesses equally in the colonies, whether settled or conquered; for it seems that the Petition of Right applies to both as being merely declaratory of the common law of England regarding the limits of the sovereign's prerogative and the subject rights." ⁽¹⁾ So far as the assumption of necessary powers for the safety of the country is concerned, the other systems of law resemble the common law of England,

(1) G. G. Phillimore, Martial Law in Rebellion, J.S.C.L., April 1900, at p.52.

but important differences will be noticeable. As to the similarity between them, it has been observed: "The common law of England is the common law of most of the self-governing Colonies, and in any case the Roman-Dutch law and the French law of Quebec admit as clearly as the English law the doctrine salus republicae suprema lex."⁽²⁾ From a consideration of the opinions of the distinguished lawyers, judges and legislators, it would seem that elsewhere, as in England, the constitutional practice has been far from uniform.

To make a labyrinthine analysis of the various applications of martial law is not our purpose. It is the want of preciseness in defining the limits of martial law which invites our attention. Though, since the days of the Stuart Kings, martial law has never been formally declared in England, whether in peace or war, it has been frequently resorted to in the colonies and dominions.

2. Governor's Power to Proclaim Martial Law

In the previous two chapters we have considered the Crown's prerogative to declare martial law in England and other questions relating to its origin, history and development. In discussing its applications in the Commonwealth, it is necessary to consider whether a Governor can proclaim martial law in the colony or the dominion when there is actually no war or rebellion. It may be mentioned that the powers of the Governor to proclaim martial law are somewhat different in a self-governing dominion from those in a colony. As Professor Keith has said:

(2) A. B. Keith, Responsible Government in the Dominions, Vol. I (1912), at p.270.

"In no self-governing Colony is there any provision for martial law as part of the law of the land, and there is therefore no statutory basis on which the proclamation of such law can rest. Nor again can it be held that there is any common law right to proclaim martial law: it is no part of the prerogative to upset the established law of the land." (3)

He found no reason why there should be any illegality in issuing a proclamation of martial law. It is difficult to imagine what crime would be committed by its mere issue, and even if it were regarded as a crime to issue a proclamation which might provoke serious resistance from aggrieved citizens, the risk of any Court so holding does not seem great. (4) Subsequent action might be illegal, but hardly the proclamation. Stripped of its phraseology it merely means that, "in the opinion of the Executive, there exists a state of matters in which the suspension of the ordinary legal forms is necessary, and it operates as a warning to citizens that this is the case, and that they should therefore be on their guard to maintain order: it may even be that such a proclamation may have effect in terrifying evil-doers and mitigating the evil results of their machinations against the State." (5)

In construing the language of the statutes in force in Lower Canada in 1838 which referred to "the undoubted prerogative of Her Majesty for the public safety to resort to the exercise of martial law against open enemies and traitors," opinions were expressed that "the

(3) Ibid, at p.269.
 (4) Ibid.
 (5) Ibid.

Governor of Lower Canada has the power of proclaiming in any district in which large bodies of the inhabitants are in open rebellion, that the Executive Government will proceed to enforce martial law."⁽⁶⁾

Even without such a proclamation when due to insurrection or rebellion the ordinary course of law could not be maintained, the Governor could proceed to put down the rebellion by force of arms, as in the case of invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance."⁽⁷⁾ Such proclamation conferred no power on the Governor which he would not have possessed without it. Its object was only to give notice to the inhabitants of the course that would be adopted for restoring tranquillity.⁽⁸⁾

In connection with the proclamation of martial law by a Governor the question sometimes arises whether such proclamation is conclusive. If the occasion does not justify its proclamation or further continuance, can the judges openly so declare, or must they accept the judgment of the Executive? In an inquiry before the House of Commons Committee into the disturbances in Ceylon in 1848, Sir Robert Peel asked whether, in "the case of a profligate or tyrannical government, having a plausible pretext for it, proclaiming martial law, and that a man was apprehended by military authority and subjected to detention" - the Court would grant habeas corpus?⁽⁹⁾ Sir David Dundas, the Judge Advocate-General,

(6) Joint Opinion of the Attorney and Solicitor Generals Sir John Campbell and Sir R. M. Rolfe, quoted in Keir and Lawson's Cases in Constitutional Law at p.445 (1954).

(7) Ibid.

(8) Ibid.

(9) Clode, Military Forces of the Crown, Vol. II, at p.506.

replied that "if there was a mere tyrannical pretext for martial law, made upon no justifiable occasion and with no necessity whatsoever, I doubt very much if there would not be found bold-hearted men in Westminster Hall to pay no obedience to this martial law."⁽¹⁰⁾

Incidentally, it might seem relevant to inquire whether or not the Governor is required to act on ministerial advice in proclaiming martial law. Legally the Governor is, of course, not bound to act on ministerial advice. In refusing to act on such advice, he may run the risk of being in a difficult position. No Governor would wish for a moment to be in the position in which Governor Eyre found himself. It is therefore only natural that in such cases the Governor should agree with his ministers. "If a ministry, which is presumably at least honest, assures the Governor that he should proclaim martial law, he would rest under a grave responsibility if he refused to do so and in the face of a crisis left the Government in hopeless confusion, while the Governor was running about trying to find a minister to accept responsibility for carrying on the Government. It is certainly within the bounds of possibility that a crisis might arise in which it was clearly the unhappy Governor's duty to dismiss ministers or to refuse their advice and accept their resignations, but it is not probable, and it may fairly be said that this is one of the cases where the Governor can hardly be expected to differ from ministers."⁽¹¹⁾

(10) Ibid.

(11) A. B. Keith, Responsible Government in the Dominions, Vol. I, (1912), at p.275.

Can the Governor, without being empowered in this behalf, declare martial law and take appropriate measures to suppress the rebellion?

(12)
In the opinion of Willes J. he certainly has such powers. The duty of adopting all reasonable steps to suppress the rebellion "is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown."
(13)

3. The Rational Basis for a Proclamation of Martial Law

Since 1628 martial law has never been formally declared in England and therefore "courts founded on Proclamations of Martial Law had been wholly unknown."
(14) This is not equivalent to saying that in emergencies government in England was powerless. We have already
(15) briefly considered, and shall more fully discuss the extent of powers
(16) exercised by the Executive during emergencies. But one thing which

(12) Phillips v. Eyre (1870), 6 Q.B.D.1.

(13) Ibid, at p.16.

(14) Per Lord Brougham in the House of Commons debate to consider the motion "That the House deem it their duty to declare that they contemplate with serious alarm and deep sorrow the violation of law and justice which is manifest in these unexampled proceedings." The proceedings took place in Demerara on a declaration of martial law in 1823. Clode, Military Forces of the Crown, Vol. II, at p.485 (1869).

(15) Chapters 1 and 2.

(16) Chapters 4 and 7-9.

mainly distinguishes the exercise of discretionary powers in England and such exercise elsewhere is that in the latter places military tribunals could be set up to try the citizens, and during the continuance of martial law the ordinary courts declined jurisdiction to entertain suits against the military authority. (17)

Leaving this aside, what has been the object of declaring martial law in the colonies? The short answer would be the need to maintain law and order. In considering the scope of the Bengal State offences Regulation No. X of 1804, which empowered the Governor-General of India in Council to proclaim martial law in time of war, or during rebellion in any part of the territory in possession of the Government of the Presidency of Fort William in Bengal, Sergeant Spankie, the Advocate-General of Bengal, stated:

"The object of martial law, and the trial of offenders under it, is justly stated, in the Regulation X of 1804, to be immediate punishment 'for the safety of the British possessions, and for the security of the lives and the property of the inhabitants thereof.' It is, in fact, the law of social defence, superseding under the pressure, and therefore under the justification, of an extreme necessity, the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering that prompt and speedy justice in cases

(17) D. F. Marais v. The G.O.C. (1902) A.C.109; Tilonko v. Attorney-General (1907) A.C.93.

presumed to be clearly and indispensably of the highest species of guilt. The object is self-preservation by the terror and example of speedy justice."⁽¹⁸⁾

In his opinion the alleged necessity for a recourse to martial law would cease to exist if the courts-martial, like ordinary courts of law, began to pronounce sentences of imprisonment and hard labour. "But courts-martial which condemn to imprisonment and hard labour belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society."⁽¹⁹⁾

The continuance of martial law beyond a period when it is no longer required is illegal. For, as was observed by Sir James Mackintosh, "the only principle on which the law of England tolerates what is called Martial Law, is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence."⁽²⁰⁾ Martial law would be justified when there is foreign invasion or civil war which rendered it impossible for courts of law to sit, or to enforce the execution of their judgments. It would then become necessary to find some rude substitute for them, and to employ for that purpose the Military, which was the only remaining Force in the community. Sir James conceded that

(18) Hough, Military Law, at p.548 (1855).

(19) Ibid.

(20) Clode, Military Forces of the Crown, Vol. II, at p.486 (1869).

"while the laws are silenced by the noise of arms, the rulers of the Armed Forces must punish, as equitably as they can, those crimes which threaten their own safety and that of society," but he maintained that (21) "every moment beyond is usurpation." He further said that "as soon as the laws can act, every other mode of punishing supposed crimes is (22) itself an enormous crime." The same opinion was expressed by Lord Brougham:

"On the pressure of a great emergency, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a Proclamation may justifiably issue for excluding the ordinary tribunals, and directing that offences should be tried by a Military Court: such a proceeding might be justified by necessity, but it could rest on that alone. Created by necessity, necessity must (23) limit its continuance."

The views expressed by the highest law officers of the Crown also show the same reasons for the promulgation of martial law, its continuance and application. "The right of resorting to such an extremity is a right arising from and limited by the necessity of the case - quod necessitas cogit, defendit. For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of suspension of the ordinary tribunals, it is impossible to deal according to

(21) Ibid, at p.486.

(22) Ibid, at p.486.

(23) Ibid, at p.484.

the regular course of justice." (24) If the regular courts are open, the criminals must be delivered to them to be tried according to law, because "there is not, as we conceive, any right in the Crown to adopt any other course of proceeding." (25) The question whether martial law, when in force, supersedes the ordinary tribunals, did not arise as it "cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been practically superseded." (26) Even if martial law is justly declared persons guilty of ordinary offences must not be tried by the military tribunals. "Martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compel its adoption." (27)

In a case (27^a) arising in India, *J. J. Beaumont*^{C.J.} of the Bombay High Court stated the position emanating from the declaration of martial law. "Firstly, a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. Secondly, neither the military nor the citizens can refuse or impose conditions on such aid. Thirdly, the necessity must be proved, not merely of recourse to the military, but also of the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being, and the courts have power to go into the question whether such necessity existed.

(24) Joint Opinion of the Attorney and Solicitor Generals, Sir John Campbell and Sir R. M. Rolfe as to the power of the Governor of Lower Canada to declare martial law, 1838. Keir and Lawson, *Cases in Constitutional Law* (1954) at p.445.

(25) Ibid.

(26) Ibid.

(27) Ibid.

(27a) *Chanappa v. Emperor*, A.I.R. 1931, Bombay 57.

Fourthly, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that the jurisdiction of the court ceases. Fifthly, the powers exercised by the military commonly but incorrectly known as "martial law" in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal and therefore need Acts of Indemnity, if they are not questioned.^(27b)"

In the same case *S. J. Beaumont*^{C.J.} said that it was convenient to arm the executive in time of emergency "with a weapon more easy to control and more certain in its operation," but where the Arms Act was in force and the mob had no arms but only sticks and stones "the attack on the police post and the court house must from the nature of things have been the work of the scum and not of persons with a stake in the town." The single allegation that an order of the Magistrate under Section 144 of the Code Criminal Procedure was not obeyed did not, therefore, suffice to establish the necessity which the law demands before martial law could be applied.^(27c)

(27b) Ibid, at p.63.

(27c) Section 144 of the Code Criminal Procedure provides as follows:

"(1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate (not being a Magistrate of the Third Class) ... there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,

Such Magistrate may, by a written order stating the material facts of the case and served in manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with certain property that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray."

4. The Guiding Principles in exercising Powers under Martial Law

Every exercise of exceptional powers, not regulated by well-defined statutes, involves the danger of the powers being exceeded. Moreover, the discretion of a commander during a state of war in no way resembles judicial discretion. He is in this dilemma. "To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task and to hesitate or temporize may entail disastrous consequences."⁽²⁸⁾ When rebellion or insurrection has broken out, should the Executive or the military commander wait for the legislature to entrust him with powers to deal with the emergency? As has been observed, "there may not be time to appeal to the legislature."⁽²⁹⁾

Should he "take the law into his own hands, and make a law for the occasion, rather than submit to anarchy?" In answering Sir Robert Peel, the Judge Advocate General said:

"I think that a wise and courageous man would, if it were necessary, make a law to his own hands, but he would much rather take a law which is already made: and, I believe the law of England is that a Governor, like the Crown, has inherent in him the right, when the necessity arises, of judging of it, and, being responsible for his work afterwards, so to deal with the laws as to supersede them all,

(28) Phillips v. Eyre (1970) 6 Q.B.D.1.
 (29) Ibid.

and to proclaim martial law for the safety of the colony." (30)

Once martial law has been proclaimed, which serves as a notice that extraordinary powers have been assumed to restore tranquillity, the paramount duty of the Executive or the Armed Forces is to take prompt and speedy action. In describing the course of action open to the Executive in such circumstances, J. Willes said:

"The Governor may have, upon his own responsibility, acting upon the best advice and information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope ...". (31)

In his charge to the jury in Governor Eyre's case, Lord Blackburn spoke at length on the manner a Governor should exercise his powers at common law in suppressing a rebellion. According to him no officer

(30) Sir David Dundas's evidence before the Ceylon Committee of Inquiry, 1849, quoted by Clode in Military Forces of the Crown, Vol. II, at p.160 (1869).

(31) (1870) 6 Q.B.D.1 at p.16.

should under any circumstances act beyond the power conferred upon him by law, "even if the doing of that illegal act was the salvation of the country." If he, therefore, does something clearly beyond his power, an Act of Indemnity passed subsequently "would be no bar in law to a criminal prosecution." Honesty of intention is important where it is his duty to act and is authorised to take all necessary measures in such circumstances, but "if it would be shown that the officer, under colour of exercising his office, was really moved by any other motive than an honest desire to do his duty," he would be guilty of a misdemeanour. Lord Blackburn said that if the circumstances were such that the officer would "be criminally punished for failure of duty in not doing it," the officer is bound to "bring to the exercise of his duty ordinary firmness, judgment, and discretion." (32)

Every officer must remember that "the danger once past, every measure he has adopted may be challenged as violent and oppressive, and he and every one who advised him, or acted under his authority, may be called upon, in actions at the suit of individuals dissatisfied with his conduct, to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose." (33) There is, however, no cogent reason why he should shrink from discharging the paramount duty, "to exercise de facto powers

(32) R. v. Eyre (1868) Special Report 53

(33) (1870) 6 Q.B.D.1 at p.17.

which the legislature would assuredly have confided to him if the emergency could have been foreseen."⁽³⁴⁾ In such a case if the officer has subsequently to face a trial, the jury, as Lord Blackburn said, should determine whether "the circumstances were in fact such that what was done really was in excess of the duty of the officer and, secondly, whether a person placed in the position of that officer, having the information that he had, believing what he did believe, and knowing what he did know, if exercising ordinary firmness, judgment and moderation, would have perceived it was an excess."⁽³⁵⁾ In the matter of suppressing an insurrection or a rebellion one should recall what Sir John Copley, the Attorney-General of England, said when in 1824 the Governor of Barbados requested the opinion upon the question whether the common law of England sanctioned the taking the life of the rioters. In Sir John's opinion "temper and coolness upon such occasions, and forbearance as far as it can be exercised consistently with the public safety, cannot be too strongly recommended."⁽³⁶⁾ As to the powers of the Armed Forces to suppress riots, he said that "by the common law the military may effectively act under the direction of the civil power."

Comparatively recently the duties of a military commander in dealing with insurrection or rebellion were clearly laid down in the

(34) Ibid, at p.16.

(35) R. v. Eyre (1868) Special Report 53

(36) William Forsyth (1869) Opinions and Cases on Constitutional Law at p.194.

Departmental Instructions to Military Authorities in 1942 by the Indian Government:

"In case of open rebellion, where the Military force available may, unless the Military Commander assumes exceptional powers, prove inadequate to meet the emergency, he should enforce Martial Law ... supplementing the ordinary law as may be necessary, but no more than is necessary, by military tribunals. In general, he should confine the exercise of his exceptional powers to taking such measures as can, on the restoration of order, be shown to have been necessary for ensuring the safety of his troops and suppressing the rebellion. Any exceptional measure taken must not only be clearly directed to the attainment of these objects, but be reasonably likely to achieve them.

Martial law means the suppression of ordinary law in any part of the country by military authority, whose sole duty is to restore such condition of things as will enable the civil authority to resume charge. In order to attain that object, the military officer may issue such orders, and enforce them in such manner as may be necessary for that purpose only. His authority is, for the time being, supreme, but in practice the amount of his interference with the civil administration and the ordinary courts is measured by military necessity. He should not interfere beyond what is necessary for the restoration of order, and should, whenever possible, act in consultation with the

local civil authorities. Offenders should be handed over to the ordinary courts for trial whenever this is possible; but persons charged with offences which are not offences against the civil law cannot be so handed over. The military officer has power to try an offender and punish him under Martial Law, but he should not exercise the power except where it is necessary for him to do so for the purpose of restoring order or where it is not possible to keep an accused person in arrest until he can be handed over for trial by the ordinary courts. Such occasion may arise if communications are interrupted during a considerable period, but even then the military officer can generally arrange for the attendance of a civil magistrate to whom prisoners can be handed over for trial, and this should be done when possible. If the military officer has to try an offender, though this should only be necessary in very exceptional circumstances, the trial should follow the forms of military law; and a record must be kept of every trial so held, and of every punishment inflicted under Martial Law. Any punishment so inflicted must not be excessive."⁽³⁷⁾

To dispel all doubts as to whether the military authorities should be willing to come to the aid of the civil authority unless the ordinary laws and tribunals were abolished, *J. J. Beaumont*^{C.J.}/of the

(37) Issued from Simla, India, quoted in Muhammad Umar Khan v. The Crown, P.L.R. 1953 Lahore 828.

Bombay High Court clearly expressed the position in the following words: "No section of the Army Act or any other Act has been cited to us to show that the military in India occupy in this respect a position different from that of His Majesty's military forces in any other part of the dominions, and if so, it is the right of the civil authorities to demand, and the duty of the military to furnish, all the armed aid that may be necessary in the suppression of disorders and breaches of peace."⁽³⁸⁾

On the other hand the civil authority should remember that they must not resort to extreme action to deal with small breaches of peace. "When Parliament itself has limited the power of the Governor-General in Council, any executive officer, even the lowest, if his orders are questioned or riots occur, has the right, because of a certain number of evil-doers who break the peace, to declare war against every other person in a large area as rebel, abolish at one stroke the ordinary laws and tribunals, and place the military in possession free to deal and to punish as they will and restore tranquillity so caused through terror."⁽³⁹⁾

5. Origins of Martial Law in British India and its Applications

(a) The Historical Background

We are not concerned with the history of the establishment of

(38) Chanappa v. The Emperor, A.I.R. 1931 Bombay at p.65.

(39) Ibid.

British rule in India, but shall briefly trace its origin in so far as it is relevant for our purpose. Since the sixteenth century European merchants were trading with India and on 31 December 1600 Queen Elizabeth I granted a Charter of Incorporation to the Company of English merchants which conferred upon it limited powers of legislative character.
(40)

The Company could hold court for itself and its affairs and "make, ordain, and constitute such and so many reasonable laws, constitutions, orders and ordinances, as to them or the greater part of them being then and there present shall seem necessary and convenient for the good government of the said Company, and of all factors, masters, mariners, and other officers, employed in any of their voyages, and for the better advancement and continuance of the said trade and traffick." Further, the Company could impose such pains, punishments, and penalties by imprisonment of body or by fines and amerciements as might seem necessary or convenient for the observation of such laws and ordinances. Though the Company was given power of minor legislation, it was forbidden to enact regulation contrary or repugnant to the principles of English law. Both laws and the punishments for their contraventions must be reasonable.

Gradually it became evident that such powers were unequal to the occasions created by the voyages to, and establishment of trading

(40) A. Berridale Keith, The Constitutional History of India (1935) at p.32.

settlements on, the Indian coasts. Though the Crown's right to authorise martial law was uncertain, authority was granted to the ship's captain to impose death sentences for such capital offences as murder and mutiny and to put in execution martial law. By the royal grant of December 1615 the Company was authorised to issue commissions to their captains, but in capital cases a verdict must be found by a jury.

In 1623 James I empowered the Company to grant commissions to its officers and provide for the due government of its officers. The Charter of Charles II in 1661 accorded powers to the Company to build fortresses and was authorised to exercise power and command over all employees and punish them for misdemeanour. The Governor and Council of each factory was empowered "to judge all persons belonging to the said Governor and Company or that shall live under them, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute judgment accordingly." The cession of Bombay by Portugal in 1661 made further extension of its authority necessary. In order to repel any force directed against the Company's authority and command over the island of Bombay, the nucleus of the first English regiment or Bombay Fusiliers was formed. The Governor of the island was empowered "to use and exercise all such powers and authorities in cases of rebellion, mutiny, or sedition, or refusing to serve in wars, flying to the enemy, forsaking colours or ensigns, or other offences against law, custom, and discipline military,

in as large and ample manner, to all intents and purposes whatsoever, as any captain-general of our army by virtue of his office has used and accustomed, and may or might lawfully do."⁽⁴¹⁾

By the Charter of 1683 the Company were authorised to declare war and make peace against any nation of Asia and Africa and to raise, arm, train, and muster such military forces as seemed requisite and necessary and to execute martial law for the defence of their forts, places, and plantations against foreign invasion or domestic insurrection or rebellion. In 1686 James II expressly authorised the Company to appoint admirals and other sea officers in their ships. These officers were given power to raise naval forces and exercise within their ships the law martial for their defence while engaged in open hostility with some other nation. The Charter of 1698 confirmed the powers given by those of 1683 and 1686 and contemplated the exercise of "the sovereign power and dominion over all the said forts, places, and plantations, to us, our heirs and successors, being always secured."⁽⁴²⁾ All these powers were maintained by William III, Anne and her successors and the Charters granted by them continued the right of the Company to appoint generals and other officers for their military forces and to exercise martial law in time of war or open hostility.

(41) Ibid, at p.10.

(42) Ibid, at p.17.

The expansion and development of the Company's army in India demanded greater controlling powers than were given by the Charters, but, as the Crown in England was denied the prerogative power to govern troops in time of peace, Parliament passed an Act in 1754 which contained provisions similar to those of the English Mutiny Acts. The Act provided punishment for mutiny, desertion and other military offences and authorised the setting up of courts-martial for the trial of military offences. At the same time the Act made oppression and other offences committed by the presidents or councils in India cognisable and punishable in England. Before the passing of this Act the officers of the Company claimed that the laws and ordinances of war enacted by it entitled them to administer martial law for mutinous conduct. Sir George Oxenden, President of Surat, when he visited the island of Bombay in 1669, expressed grave doubts about the legality of the aforesaid ordinances. In observing that his doubts were natural and justified, Professor Keith has said:

"No state of war proper could be held then to exist, and the extent of the right of the Crown to authorise punishment of such offences as mutiny and desertion by courts-martial in time of peace was wholly doubtful. James II had in 1685 asserted the right to punish drastically by courts-martial so long as the insurrection of Monmouth was raging, but he had instructed recourse to the civil courts the moment warfare had ceased, and this was in accord with the spirit of the Petition of Right of 1628 and the contemporary debates in the

House of Commons, which showed that it was held in legal circles under Charles I that even soldiers under the common law could not in time of peace be dealt with by martial law, a system essentially intended for the government of armed forces when war was raging." (43)

The Company's claim to govern under martial law was therefore invalid. When the King had no power to authorise the use of martial law in civil matters and the Company were required to make laws not contrary or repugnant to English law, it was not within its powers to govern by martial law. As has been rightly said, "the whole episode is suggestive of the period of prerogative run mad which precluded the Revolution of 1688." (44) The Act of 1754 passed by Parliament removed all doubts as to the power of the Company to punish by courts-martial any of its officers for offences committed in time of peace. (45)

(b) Occasions for Declarations of Martial Law during British Rule in India and the Measures adopted by the Authority

Soon after the First World War the British Government showed willingness to consider the grant of greater measure of freedom to the Indians but, before the Act of 1919 could be enacted, the political atmosphere in India was becoming disturbed. The general discontent

(43) Ibid, at p.33.

(44) Ibid, at p.39.

(45) "It was not until 1754 that the position of martial law in India was brought into accord with that in England by the passing of an Act of Parliament, based on the analogy of the English Mutiny Act." Ibid, at p.34.

was due in part to the effects of war, but also to certain legislative measures of the Government. Bills were introduced in the Indian Legislature to control the Press, try political offenders without a jury, and intern persons suspected of subversive political activities.

~~The~~ response to Gandhi's call for satyagraha or passive resistance, hartal or abstention from business was observed throughout India. Riots broke out in the Punjab on 10th April, 1919, and when, in defiance of General Dyer's orders forbidding meetings, people assembled at Jallianwala Bagh on 13th April, he opened fire on the mob, with the result that 379 were killed and 1,208 wounded. General Dyer, who should have realised that the place was so enclosed that quick dispersal was impossible, put up the defence that "the firing was carried out to produce such a moral effect as would secure order in the Punjab." (46) However, a Committee under the chairmanship of Lord Hunter was subsequently appointed to investigate into the causes of the firing. In its opinion General Dyer's action was unjustified in so far as it aimed to strike terror into the rest of the province. The military commander, instead of being moved by such ulterior motives, should confine himself to the immediate task of taking such action as was absolutely necessary for the prevention of loss and life and destruction of property. His action was also disapproved by the Secretary of State and the Army Council.

(46) Ibid, at p.275.

Being "satisfied that a state of open rebellion against the authority of the Government exists in certain parts of the Province of Punjab" the Governor-General in Council, in exercise of the powers conferred by Section 2 of the Bengal State Offences Regulation, 1804, suspended the functions of the ordinary courts, established martial law and directed the immediate trial by courts-martial persons charged with offences described in the said Regulation. Next, the Governor-General, in exercise of the power conferred by section 72 of the Government of India Act, 1915, promulgated the Martial Law Ordinance (47) No. 1 of 1919. Section 72 provided that "the Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act." By Martial Law Ordinance No. 1 of 1919, trial by commissioners, two of whom must be Sessions Judges, was substituted for trial by courts-martial, but the Commission was to follow the procedure regulating trials by courts-martial prescribed under the Indian Army Act, 1911.

(47) Appendix I.

(48)

In Bugga v. The King-Emperor, as will be presently seen, the Judicial Committee of the Privy Council held that the Ordinance which deprived a subject of trial by the ordinary courts was perfectly legal. By Martial Law Ordinance No. II the martial law area was extended to two other districts, Gujranwala and Gujrat. The death penalty ~~was~~^{and the law} by the Bengal Regulation of 1804 was modified by Ordinance No. III which permitted any lesser punishment. By Ordinance No. IV, offences committed before the promulgation of Ordinance No. I were made punishable. Martial Law (Trials Continuance) Ordinance No. VI of 1919 provided that "when an order under Section 2 of the Bengal State Offences Regulation, 1804, suspending the functions of the ordinary criminal courts in any district has been cancelled and martial law has ceased to operate, every trial which may at the time of such cancellation be pending before any Commission appointed, as a result of such order, under Martial Law Ordinance No. I of 1919, shall be continued by such Commission, and any person accused in any such trial may be convicted and sentenced and any such sentence shall be carried into execution, as if such order had not been cancelled."

Section 3 of Ordinance No. VI provided for continuation of trials pending before Summary Courts after the withdrawal of martial law. It declared that "notwithstanding that the function s of the

ordinary criminal courts have been suspended in any district and that a trial has commenced before a summary court other than an ordinary criminal court, such trial shall, when the summary court ceases, by reason of the cessation of martial law, to exercise jurisdiction therein, be continued before any competent criminal court which would have had jurisdiction save for the existence of martial law, and such court may act on the evidence recorded by the summary court or partly recorded by ~~the~~ such court and partly recorded by itself, or it may re-summon the witnesses and re-commence the trial." The accused could, at the commencement of the proceedings before the second court, demand that the witnesses or any of them be re-summoned and re-heard.

The Indemnity Act No. XXVII of 1919 was passed to indemnify officers of Government and other persons in respect of certain acts done under martial law which was declared and enforced in some districts in the Punjab. Provisions were made for allowing reasonable compensation for property taken or used by any officer of Government, whether civil or military. It was to be assessed "upon failure of agreement by a person holding judicial office not inferior to that of a District Judge to be appointed by the Government in this behalf." (49) It must be admitted that such provision for payment of compensation in respect of loss attributable to acts of the military or civil officers was remarkable. It might not have entirely satisfied the sense of

(49) Appendix II.

injustice caused by the application of force, but it goes a long way to prove a foreign government's regard for the citizen's rights.

In 1921 martial law was proclaimed in Malabar in Madras and an Ordinance empowered military authorities to make regulations for administering martial law and issuing orders to provide for the public safety, the maintenance and restoration of order and to authorise the trial of certain offences by Special Courts constituted under the (50) Ordinance. Provisions similar to those contained in the Bengal State (51) Offences Regulation, 1804, existed in Madras. In 1930 an Ordinance provided for the proclamation of martial law in the town of Sholapur in the province of Bombay.

(c) The Judicial Determinations as to the various Aspects of Martial Law

(52)

In Chanappa v. Emperor questions were raised as to the meaning of martial law, its applicability in India, the extent of military authority, the Governor-General's power to declare emergency, the courts' jurisdiction to decide whether sufficient evidence existed as to the necessity for such a declaration.

The question whether the determination as to the existence of an emergency is an administrative act to be decided by the Governor-General alone or whether it, being a question of fact, can be inquired

(50) Appendix III.

(51) Regulation VII of 1808 and Act XI of 1857.

(52) A.I.R. 1931 Bombay 57; martial law ordinance No. IV of 1930 was promulgated, Appendix IV.

into by the courts was fully considered by J. J. Beaumont. He thought that the court had such power and where martial law had been declared it was competent for the court - and was "indeed the duty of the courts if called upon, after the restoration of normal conditions to decide whether and to what extent martial law was justified." (53) But as the consideration whether the facts proved constituted a state of necessity and if so how long that necessity existed, involved difficulty, the court would hesitate to reject the assertion of the Executive as to its existence. Moreover, "inasmuch as the Governor-General is the person who must, in the first instance, decide whether or not there is an emergency upon which he ought to act, and inasmuch as he may frequently have information which in the public interest he may be unwilling to disclose, and which no court can compel him to disclose, I think all that the courts can do is to inquire whether there is evidence upon which the Governor-General may reasonably conclude that an emergency exists. If that question be answered in the affirmative, (54) there is an end of the matter."

to
As/the contention on behalf of the Crown that so long as the Executive and the military authority acted bona fide, their actions were not subject to the ordinary laws of the land and needed no

(53) Ibid, at p.58.

(54) Ibid, at p.58.

validating ordinance, *P. J. Beaumont*^{et J.} said that it was wholly untenable. Not only must the military authority prove its bona fides, but it should also establish the existence of necessity to justify their acts. "The justification for the acts of the military lies not merely in their bona fides but in the existence of necessity, i.e. in the proof of such a state of war, insurrection or armed resistance as to justify the cessation of the ordinary law and its replacement by military force pure and simple."⁽⁵⁵⁾

P. J. Beaumont^{et J.} equally rejected the contention that the ordinary court had no jurisdiction to review the sentences passed by the military courts even if an Act of Indemnity had not been enacted. He said that "it is for the Crown to prove the necessity and the legality of any sentences, civil or military, if not under the ordinary law, then under any Act of Indemnity."⁽⁵⁶⁾
⁽⁵⁷⁾

In Bugga v. The King-Emperor, an appeal from a judgment of the Martial Law Commissioners, sitting at Lahore on 2 June, 1919, involved the decision whether the setting up of tribunals under the provisions of a Martial Law Ordinance was allowed by the Constitution. The facts were that the appellants, who had committed several offences under the Indian Penal Code, such as waging of war against the king, murder, arson and riot, were convicted and sentenced to death; one of them

(55) Ibid, at p.65.

(56) Ibid.

(57) (1920) 36 Times Law Reports 340.

only was convicted of possession of looted property and sentenced to seven years' rigorous imprisonment. The offences were committed during a serious riot at Amritsar, Punjab.

Three days after the riots, the Governor-General of India proclaimed martial law in the districts of Lahore and Amritsar and suspended the functions of the ordinary courts of law. Similar orders were subsequently made in respect of Gujranwala and Gujrat. He purported to act under the Bengal State Offences Regulation No. X of 1804 which was extended to the Punjab by the Punjab Laws Act, 1872. The day after he had made the above proclamation stating the existence of open rebellion against the authority of the Government, the Governor-General, acting under Section 72 of the Government of India Act, 1919, made and promulgated the Martial Law Ordinance No. 1 of 1919.⁽⁵⁸⁾ It provided that every trial in the districts of Lahore and Amritsar held under the Bengal State Offences Regulation, 1804, should, instead of being held by a Court-martial, be held by a Commission consisting of three persons appointed in this behalf by the Local Government, of whom two should be Sessions Judges or persons having legal qualifications as therein mentioned. It was also provided that a Commission should have the powers of a general Court-martial under the Indian Army Act, 1911, and should follow so far as might be the procedure prescribed by that Act. The Local Government could direct that the Commission should

(58) Appendix I.

follow the procedure of a summary general Court-martial. The finding and sentence of a Commission was not subject to confirmation by the military authorities. By subsequent Ordinances power was given to impose a minor punishment in lieu of the death sentence. Pursuant to the Ordinance No. 1 of 1919 the Punjab Government duly appointed the Commission. The Martial Law (Further Extension) Ordinance No. IV of 1919 provided that "notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may, by general or special order, direct that any commission appointed under the said Ordinance shall try any person charged with any offence committed on or after 30th March, 1919, and thereupon the provisions of the said Ordinance shall apply to such trials accordingly, and a commission may pass in respect of any such offence any sentence authorised by law." The offences ^{/charged were} committed by the appellants ~~charged were~~ on 10th April and Section 7 of the Ordinance No. 1 had declared that the provisions contained therein "shall apply to all persons referred to in the said Regulation who are charged with any of the offences therein described, committed on or after 13th April, 1919." Under the aforesaid piece of retroactive legislation the trial of the appellants took place. Special leave was obtained from the Judicial Committee of the Privy Council to present this appeal.

The argument for the appellants mainly rested on the contention that, if Ordinance No. IV of 1919 applied (subject to the direction of the Local Government) to any person and to any offence known to the

law, it was invalid by reason of the provisions of Section 65, sub-sections (2) and (3), of the Government of India Act, 1915. Section 65, sub-section (2), read with Section 72, prevented the Governor-General from making "any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India."

It was contended that the Ordinance under consideration, by depriving British subjects in India of the right to be tried in the ordinary course by the established Courts of Law, affected the unwritten laws or constitution whereon the allegiance of His Majesty's subjects in India depends and was accordingly invalid under Section 65 mentioned above. In rejecting the appellants' argument, Lord Cave, in delivering the opinion of the Judicial Committee, said:

"It is not easy to understand how the substitution for the ordinary Indian Courts - which are themselves of statutory origin - of another tribunal of a judicial character, can be said to affect in any way the unwritten laws or constitution of the country; but, apart from this observation, the argument appears to rest upon a misconception as to the meaning and effect of the sub-section. The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his

allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown, as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed."⁽⁵⁹⁾

(60)

In In Re Kochunni Elaya Nair an application for the issue of a writ of habeas corpus was made for the release of the prisoner who was alleged to have been illegally detained. It was contended on his behalf that the accused could not be legally arrested for an offence committed inside the Martial Law Area when he was at the time of his arrest outside the Area. Secondly, the magistrate before whom he was brought and who refused to release him on bail had no jurisdiction to exercise his powers, since Clause (6) of the Martial Law Ordinance No. II of 1921 provided for the constitution of summary courts of criminal jurisdiction in any administration area that may be proclaimed as Martial Law Area.

On the question whether a police officer can arrest a person outside the Martial Law Area for an offence committed inside it, J. Spencer^J held that, under the provisions of Section 177 of the Code of Criminal Procedure, the rule as to jurisdiction was that it was the area within which the offence was committed and not the place where the

(59) Ibid, at p.343.

(60) A.I.R. 1922 Madras 215.

offender was found which determined the jurisdiction of the Court. Section 54 of the same Code authorises any police officer to arrest without a warrant and without an order from a Magistrate a person concerned in any cognisable offence. Section 58 authorises a police officer for the purpose of arresting without warrant any person whom he is authorised to arrest to pursue such person into any place in British India. Section 60 directs a police officer making an arrest without a warrant to take the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case. J. Spencer J. said that there was no alteration of the law in this respect in consequence of the constitution of the Martial Law courts and the provisions of the Code of Criminal Procedure were not abrogated or suspended by the introduction of Martial Law. On the contrary, Clause (12) and the other clauses of the Ordinance No. II for 1921 indicated that the courts constituted under it were to follow, as far as possible, the procedure laid down in the Code. The police should, as early as possible, take the prisoner into the Martial Law Area and obtain orders of a Court constituted under the Ordinance. This could be done without any order of the nature of an extradition order, inasmuch as the whole of the Malabar district was under the administration of the British Indian Government. As the petitioner's counsel failed to show that the police acted without jurisdiction, the first contention failed.

The next ground was that, when the petitioner was brought before the Magistrate outside the Martial Law Area, an application for bail was summarily rejected without even hearing the counsel. Under the provisions of Section 167 of the Code of Criminal Procedure, the nearest Magistrate to whom an offender may be brought has authority to order his detention in such custody as he may think fit for a term not exceeding fifteen days or, if he has no jurisdiction to try the case, he may order the offender to be forwarded to a Magistrate who has jurisdiction. According to J. Spencer J., there was nothing illegal in the procedure adopted by the Magistrate in this case in summarily rejecting the application for bail. This was the only course open to a Magistrate who lacked the jurisdiction to try the offence.

To deal with terrorist movements mainly confined to Bengal the Executive was armed with extraordinary powers of arrest, detention and trial by several special enactments. From 1930 onwards it became necessary for a fairly long period to have recourse to the measures prescribed by them, but in almost all cases the special tribunals set up under those Acts were presided over by judges.

The Meaning of the "State of Siege"

So far we have discussed the purely English conceptions of the expression "martial law." We may now refer to a similar doctrine known as "état de siège," or "the state of siege" available in European countries, especially France, "although neither in French

(62)

nor in English is it confined to places under siege." According to Professor Max Radin the state of siege means "the situation of places, large or small, invested or overrun or threatened by armed enemies or endangered by insurrection."⁽⁶³⁾

Admitting the truth in Dickey's remarks we may examine briefly the French law in this respect. Three conditions are postulated when a "state of siege" declared in France. First, there must be domestic insurrection or presence of foreign enemy in some parts or districts of the country. It can lawfully be declared only "en cas de peril imminent, resultant d'une guerre étrangère ou d'une insurrection á main armée." Secondly, the civil authority must either act in concert with or in subordination to the military. Finally the civil law is suspended and the people are made subservient to military authority, that is to say, the ordinary civil courts are superseded by military tribunals.

We quote below the statement of a French writer as to the terms of the law which will perhaps "give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris, or some other part of France, is declared in a state of sigge;"⁽⁶⁴⁾

(62) Max Radin, Martial Law and the State of Siege (1942) 30 CALIFORNIA LAW REVIEW 634 at p.636.

(63) Ibid.

(64) "The legal aspect of this condition of affairs in states which recognise the existence of this kind of martial law (i.e. the state of siege) can hardly be better given than by citing some of the provisions of the law which at the present day regulates the state of siege in France." - A. V. Divy, The Law of the Constitution (1959) Tenth edition, at p.292.

it will help to understand the meaning and nature of the expression "l'état de siège":

L'état de Siège

Notion

1028 - L'état de siège est un régime exceptionnel de police justifié par l'idée de péril national. Il est réglementé en France par la loi du 9 août 1849 modifiée par les lois du 3 avril 1878 et du 27 avril 1916.

L'état de siège, qui peut être déclaré pour tout le pays ou certaines parties seulement du territoire, est encore appelé état de siège politique ou fictif pour distinguer de l'état de siège réel, lequel peut être déclaré par le commandant d'une place assiégée ou menacée.

1029 - Déclaration de l'état de siège - L'état de siège politique ne peut être déclaré que par une loi; exceptionnellement, en cas d'ajournement du Parlement, il peut être déclaré par un décret en conseil des Ministres mais le Parlement doit se réunir deux jours après.

En 1939, l'état de siège a été déclaré pour la France et l'Algérie par le décret-loi du 1er Septembre 1939; il a été levé par les décrets des 12 octobre et 12 décembre 1945.

1030 - Effets l'état de siège - 1. Transfert de compétences - le premier effet de l'état de siège est la substitution des autorités militaires, aux autorités administratives civiles pour l'exercice des pouvoirs de police.

Cependant ce transfert n'est pas absolu et automatique.

D'après la loi de 1849, Art. 7, il ne se produit que dans la mesure où l'autorité militaire le juge utile, c'est-à-dire que celle-ci a seulement la faculté de dessaisir l'autorité civil.

1031 - 2. Pouvoirs exceptionnels - L'état de siège a en second lieu pour effet d'élargir les pouvoirs ordinaires de police en rendant légitimes des mesures exceptionnelles qui ne le sont pas en temps normal. C'est l'article 9 de la loi de 1849 qui énumère ces pouvoirs exorbitants, ils consistent dans le droit: 1. de perquisitionner de jour et de nuit au domicile des citoyens; 2, d'éloigner les repris de justice et les individus non domiciliés dans la zone d'état de siège; 3, d'ordonner la remise des armes et munitions et de procéder à leur recherche et enlèvement; 4, d'interdire les publications et réunions jugées de nature à exciter ou à entretenir le désordre.

1032 - 3. Compétence des tribunaux militaires - Enfin l'état de siège a pour effet d'élargir la compétence des tribunaux militaires (L. 27 avril 1916 et 23 déc. 1942); ceux-ci deviennent compétents pour connaître d'infractions commises par des civil. V. à cet égard les ouvrages de droit pénal. (65)

(65) Andre de Laubadère - TRAITE ELEMENTAIRE DE DROIT ADMINISTRATIF (1957) at p.529. The passages quoted above may be translated as follows: " The State of Siege

1028 - Conception - It is an exceptional police regime which is justified by the idea of national danger. The legal enactments which are applicable now are of 9th August 1849 modified by two other laws of April 1878 and 27 April 1916.

L'etat de siege which can be applied to the whole country or only parts of the country is also called etat de siege politique

A declaration of a state of siege was first provided by the
 (66)
 Constituent Assembly set up after the French Revolution. This was
 the "real" state of siege which was applicable only in time of war.
 In practice this was applied in places where disturbances occurred.

or fictif, so as to distinguish it from l'etat de siege reel
 which the commanding officer of the city which will be besieged
 declares.

1029 - Declaration of the State of Siege - L'etat de siege can only
 be declared by an Act of Parliament, exceptionally when the
 Parliament had been adjourned it can be declared by a decree
 taken in a meeting of the cabinet. But then Parliament must
 assemble two days after the decree.

1030 - Effects of the State of Siege - 1. Transfer of power from the
 public authority to the military authority so far as the police
 powers are concerned. But this transfer is not automatic.
 According to the law of 1849, Article 7, the military authority
 can but does not have to take over the powers of the public
 authority.

1031 - 2. The etat de siege results in an increase of ordinary police
 powers and justifies certain exceptional measures which are
 illegal in the ordinary course of things. These exceptional
 powers are stated by Article 9 of the 1849 Act:

- (1) The right of searching private houses by day and
 by night;
- (2) To send away convicted persons and individuals who
 are not resident in the area where the state of siege
 has been declared;
- (3) The right to order the surrendering of arms and
 ammunitions and to search for them and to take them
 away;
- (4) The right to prohibit publications and meetings of
 any nature that may excite or keep up disorder.

1032 - 3. The powers of the military tribunals - The state of siege
 enlarges the jurisdiction of the military tribunals (according
 to two laws of 27 April 1916 and 23 December 1952); the
 military tribunals have jurisdiction over all sorts of
 offences and crimes."

(66) Law of 10 July 1791, tit. I, Art. 11.

In 1848 the Constitutional Assembly of the Second Republic provided for a declaration of "etat de siege fictif," or the "constructive state of siege." Article 100 of the Constitution of 1848 enacted "A law will set forth the situations in which a state of siege may be declared. This law will regulate the procedure and effects of such a measure." The first law dealing with a declaration of a state of siege was the law of 9th August, 1849, modified by two other laws of 3 April 1878 and 27 April 1916.

Though from the terms of the constitutional provision it appeared that a constructive state of siege could be declared only by the legislature, it was frequently done by decree. The Constitution of 1852 empowered the head of the State to declare a state of siege. But such a declaration required confirmation by the Senate. ⁽⁶⁷⁾ The law of April 1878 provided that only the legislature could declare it, if in session, and only for a specified period, after which it would cease to operate.

The Law of 27 April 1916 limited the powers granted by the law of 1849. It laid down that the authority of military tribunals over civilians would end when peace was restored, no matter whether the state of siege was formally withdrawn or not. If the state of siege was declared on a threatened insurrection, the military tribunals could exercise powers over civilians only in respect of the offences specified in the Code of Military Justice or in other statutes.

(67) Article 18.

It is, however, important to remember the distinction between the etat de siege reel and the etat de siege fictif. In the case of an "actual" (reel) state of siege, the situation demands the suspension of law, for no military commander can, in time of actual war, afford to exercise the same caution and circumspection as are proper and necessary in peace.

The position under a constructive state of siege is altogether different. "But the constructive state of siege, although in the French case it implies war and invasion, also implied that the immediate and total disruption of civil life had not taken place although there was a distinct danger that it might. For that reason, this reorganisation of the system of law gives an eminently satisfactory solution. It displaces civil ~~processes~~ only so far as they need be displaced. It expedites and simplifies procedure but it assumes the obligation to maintain law and the constitutional guarantees substantially intact."⁽⁶⁸⁾

From the fact that in a state of siege military tribunals are substituted for civil tribunals and seen to exercise powers over the entire population, both soldiers and civilians,⁽⁶⁹⁾ it has been assumed that "during this suspension of ordinary law, any man whatever is liable to arrest, imprisonment, or execution at the will of a

(68) (1942) 30 CALIFORNIA LAW REVIEW 634 No. 640.

(69) It is, however, true that this kind of martial law is in England utterly unknown to the constitution." - A. V. Divy, The Law of the Constitution (1959) Tenth edition, at p.293.

military tribunal consisting of a few officers who are excited by
 the passions natural to civil ⁽⁷⁰⁾war."

But, as has been observed, "the state of siege is not a condition in which the law is temporarily abrogated, and the arbitrary fiat of a commander takes its place. It is emphatically a legal institution, expressly authorized by the constitutions and the various bills of rights that succeeded each other in France, and organised under this ⁽⁷¹⁾authority by a specific statute."

Thus, in France a proclamation of a state of siege is regulated by law and subject to known limitations, whereas in the commonwealth countries as the United States of America there is no law on the subject. ¶ "In France the declaration of a state of siege, and particularly the legal results consequent thereto, are regulated by statute. The state of siege is a definite legal status. Quite different is the situation in the United States (and for that matter, in Anglo-Saxon countries generally), where the law governing an exercise of martial ⁽⁷²⁾rule is largely customary and judge-made."

(70) Ibid, at pp.292-293.

(71) (1942) 30 CALIFORNIA LAW REVIEW 634 at p.637.

(72) Charles Fairman, Martial Rule and the Suppression of Insurrection (1929) 23 ILLINOIS LAW REVIEW 766 at 776.

CHAPTER 4THE AMERICAN EXPERIENCE1. Frequent Applications of Martial Law by State Authority

From a study of the many applications of martial law in America, it appears that the meaning attributed to it comes nearer to its modern definition in English law. Before considering the scope of martial law in that country, we may pause to consider why, in England, there has never been a formal proclamation of martial law since 1628, whereas in the United States there has been "a perfect epidemic of declarations of martial law in some ill-defined sense of the term, by the Governors of States."⁽¹⁾

The reason can only be found in the constitutional histories of the two countries.⁽²⁾ While the English people gradually asserted their sovereignty against the Crown's prerogative to rule arbitrarily, leading to the abolition of martial law in 1628; in America in spite of the Declaration of Independence, which articulated grievances against the King's attempt to render the armed forces superior to the civil power, both the State and the Federal Executive began to assume greater and

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- (1) Edward S. Corwin, The Constitution and What it Means Today (1958) twelfth edition, at p.123.
 - (2) Ballantine, Unconstitutional Claims of the Military Authority (1915) 24 Yale Law Journal 202. "The whole history of English constitutional development shows a dramatic and successful struggle for the complete subordination of executive power to law. In American constitutional law, a tendency appears to restrict the sphere of law, both in favour of property rights and contracts as against legislative power and also in favour of the independence of executive power as against liberty."

(3)
 more comprehensive powers. Still, as it was the fear of subordination of executive, legislative and judicial authorities to arbitrary military rule which led the founding fathers to make constitutional declarations against such eventualities, "the executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation, did not lose sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power."⁽⁴⁾

For a proper discussion of the scope and extent of the exercise of powers on a declaration of martial law, it is to be remembered that the courts had to judge its propriety in the light of the constitutional provisions. Moreover, the federal system of government created difficulties unknown in a unitary system of government.⁽⁵⁾

Another important aspect of the applications of martial law in America is that, as martial law involves delegation of power, it is

(3) "When later the American colonies declared their independence one of the grievances listed by Jefferson was that the King had endeavoured to render the military superior to the civil power," - per J. BlackJin Duncan v. Kahanamoku (1945) 327 U.S. at p.230.

(4) Ibid, at p.320.

(5) Charles Fairman, The Law of Martial Rule and the National Emergency (1942) Harvard Law Review, 1253 at p.1264.

"Particular provisions of national and state constitutions and legislation and certain features of federal jurisdiction introduce com which should be kept firmly in mind in examining the law of martial rule in America."

essential that its exercise does not amount to an abdication of power either by the executive or the legislature. "The Federal Constitution and State Constitutions of this country divide the governmental power into three branches ... in carrying out that constitutional division ... it is a breach of the national fundamental law if Congress give up its legislative power and transfers it to the President ... " (6)

The various attempts of American lawyers and judges to define martial law create the same confusion as the opinions of the English jurists. (7) We may, however, without confining ourselves to a discussion of this common mistaken notion, proceed to consider the confirmed American viewpoints in relation to martial law. Unanimity cannot be expected here as elsewhere lawyers and judges differ as to the permissible limits within which the executive and the armed forces should confine their activities and also as to the scope of the power of judicial control. Moreover, the courts had to consider the whole matter with reference to written constitutions, both Federal and State. To discover the proper meaning and scope of martial law they did not, of course, have to seek assistance from its past history, as there was none.

The essence of all these definitions is that martial law is "hardly anything more than a general term for the operation in situations of

(6) Edward S. Corwin, The Constitution and What it Means Today, Twelfth edition (1958), at p.5.

(7) "The common law authorities and commentators afford no clue to what martial law as understood in England really is ... In this country it is still worse." - 8 Opinions of Attorney-General, 367 (1859).

public emergency of certain well-known principles of the common law." (8)

(9)
In Ex parte Milligan it was said that "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real." Again, "the term martial law refers to the exceptional measures adopted, whether by the military or the civil authorities, in times of war or of domestic disturbance, for the preservation of order and the maintenance of the public authority." (10)

It may be mentioned that nowhere in the constitution is there any mention of "martial law." "The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term." (11)

2. The Suspension of Habeas Corpus

The American Constitution contains the following provisions.

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- (8) Edward S. Corwin, The President (1948) 3rd edition, at p.173.
 (9) 4 Wall 2 (1866). In referring to the Milligan decision that martial law cannot arise from threatened invasion Corwin said: "The meaning intended is that martial law is not judicially cognizable as an act of human authority, but only as an occasional ugly supervening fact. It, therefore, never supplants the civil powers in consequence of anybody's exercising any judgment in the matter; it springs into existence automatically when the civil power has ceased to exist for the time being. The idea has a mystical tinge. The suggestion that martial law has been confined in the past to situations which totally deprived persons in authority of discretion again flouts the verdict of history and - for recent years at least - that of opinion. Total War and the Constitution (1947) p.102.
 (10) Moore, International Law Digest, Vol. II, 186.
 (11) Duncan v. Kahanamoku, 327 U.S. 315 (1945).

"The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."⁽¹²⁾ The Article relates to the powers of Congress and therefore the prohibition is directed to the federal government. The conditions precedent to the suspension of the writ are two, namely, (i) the existence of rebellion or invasion, and (ii) grounds of public safety. These two things must co-exist before the writ can be suspended.

It is needless to say that on the suspension of the writ the executive agents may arrest any person without giving grounds, and such arrests go without a judicial remedy. The presumption that the suspension of the writ legalises all arrests and detention is without substance. The persons who are responsible for the arrests and detention may be held liable, both civilly and criminally, for illegality. The courts are not precluded, by the suspension of the writ, from issuing it, but the suspension furnishes "a legal ground⁽¹³⁾ for a refusal to obey it."

The suspension of the writ is not equivalent to the declaration of martial law, but the necessity for both must be the same. "The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law."⁽¹⁴⁾

(12) Article I, Section 9, Clause 2.

(13) Willoughby, The Constitutional Law of the United States (1910)

(14) Ibid, at p,1255.

As the power to suspend the privilege of the writ of habeas corpus is contained in an Article of the Constitution which relates to the powers exercisable by Congress, in some cases it has been held that Congress alone has the power to suspend it. In En parte Bollman the Supreme court of the United States assumed that the power of suspension belonged to Congress. ⁽¹⁵⁾ ⁽¹⁶⁾ ^{C.J.} Marshall said: "If at any time the public safety should require the suspension of the powers vested by this Act (granting jurisdiction) in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the legislature is to decide. Until the legislature will be expressed, this court can only see its duty and must obey the laws."

According to ^{C.J.} Taney/of the American Supreme Court, the President has, in so far as the life, liberty or property of citizens are concerned, the power and duty as prescribed in Article II, Section 3, which provides "that we shall take care that the laws shall be faithfully executed." ⁽¹⁷⁾ He said:

"I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorise the suspension

(14) Story, Commentaries on the Constitution of the United States (1891) Fifth edition, Vol. II, at p.215. "It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

(15) 4 Cr. 75.

(17) Ex Parte Merryman (1861) 106 Fed. Case 144.

of the privilege of the writ of habeas corpus, and the judicial power also by arresting and imprisoning a person without due process of law."⁽¹⁸⁾

Against such views two equally plausible arguments have been advanced. First, "rebellion or invasion" may occur when Congress is not in session. Secondly, the rebellion may be against the State and not Federal authority.⁽¹⁹⁾

However, the legal basis of the Presidential Proclamations suspending the writ of habeas corpus during the American Civil War was supposed to rest on Article I, Section 9, Clause 2. "These proclamations and orders were all based upon the theory that under Article I, Section 9, Clause 2 of the Constitution, or otherwise, the President alone, in the absence of any authority from Congress, was empowered to suspend the privilege of the writ."⁽²⁰⁾

(18) Ibid.

(19) Halleck, International Law (1878) Vol. I, at p.499.

(20) Winthrop, A Digest of Opinions of the Judge Advocate-General of the Army, 1436 (1901).

By Proclamation of 10 May, 1861, the President authorized the commander of the United States forces on the Florida Coast "to suspend there the writ of habeas corpus" if he found it necessary. The President's Proclamation of 24 September, 1862, subjected to martial law and trial by military courts certain classes of persons named, and suspended the privilege of the writ of habeas corpus as to persons who were imprisoned under military sentence during the rebellion.

An Act of Congress of 3 March, 1863, C.81, S.1. provided: "that during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof."

In pursuance of this Act the President issued a Proclamation suspending the privilege of the writ generally and throughout the

As early as 1861 President Lincoln referred the legal question to the Attorney-General of U.S.A. who rendered the following opinion as to the powers of the President to suspend the writ of habeas corpus in view of the specific provision of Article I, Section 9, Clause 2. He said:

"If by the phrase 'the suspension of the privilege of the writ of habeas corpus' we must understand a repeal of all powers to issue the writ, then I fully admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean that in case of a great and dangerous rebellion like the present the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion that the President has lawful power to suspend the privilege of persons under such circumstances; for he is especially charged by the constitution with the 'public safety', and he is the sole judge of the emergency which requires his prompt action.

"This power in the President is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency when the judiciary is found too weak to
(21)
insure the public safety."

United States, in all cases "where, by the authority of the President of the United States, military, naval and civil officers of the United States or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy ... "

(21) Ten Opinions of the Attorney-General 74 (1861).

Thus, according to Attorney General Bates the President had the power to arrest and imprison persons guilty of aiding or abetting the insurrection and the power to suspend the writ of habeas corpus was a necessary ingredient of this power. Several views were also advanced in support of the President's right to suspend the writ. One ingenious argument was that the constitutional clause (Article I, Section 9, Clause 2) itself stood in the place of an Act of Parliament, with the result that the President did not need congressional authorisation. Others held that the President's power was an emergency power, and action under it was subject to congressional review. A third view was that "in case of invasion from abroad or rebellion at home, the President may declare, or exercise, or authorize martial law at his discretion, and in so doing suspend the writ."⁽²²⁾

How far a Presidential suspension of the writ of habeas corpus would meet with the approval of present-day lawyers and judges if the President were to-day to suspend the writ, it is very difficult to say. "In a future crisis the Presidential power to suspend would probably be just as much an open question as during the Civil War. As to the actual precedent of that war, the outstanding fact is that the chief executive 'suspended the writ', and that so far as legal consequences were concerned, he was not restrained in so doing by Congress nor by the courts."⁽²³⁾

(22) Edward S. Corwin, The President, at pp.179-80 (1948).

(23) Randall, Constitutional Problems under Lincoln (New York, 1926), pp.136-7.

3. Jurisdiction of the Federal Authority

The judicial history of martial law under the constitution of the United States begins with the case of Luther v. Borden. During (24) Dorrr's Rebellion in Rhode Island in 1842, the legislature had enacted that martial law should be exercised and under colour of authority thus created some militiamen entered the house of the plaintiff and arrested him as an adherent of the rebels. Chief Justice Taney held that as the government of the Island was the best judge of the situation arising out of the armed opposition, the questions raised (25) in this case were not within the court's jurisdiction to decide.

(24) (1849) 7 How. 1.

(25) "Unquestionably a state may use its military powers to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified through the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest anyone, who from the information before them they had reasonable grounds to believe was engaged in the insurrection; and order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this martial law and the military array of the government would be mere parade and rather encourage attack than repel it." - per Chief Justice Taney.

Justice Woodbury, in a dissenting opinion, said that the Rhode Island legislature had no power to declare martial law. He would not concede to the legislature the power to suspend or abolish all constitutional restrictions as martial law does, even in time of legitimate war. By martial law he meant that "every citizen, instead of reposing under the shield of known and fixed laws as to liberty, property and life, exists with a rope round his neck subject to be hung up by a military despot at the next lamp-post under the sentence of some drum-head court-martial." According to him such a regime could come into existence only during war. But war could be declared only by Congress and states could not engage in war without the permission of Congress.

(26)

The majority, however, held that if the military government was unnecessarily prolonged, the republican form of government visualised by the constitution would no longer exist. They also agreed that "no more force ... can be used than is necessary to accomplish the object. And if power is exercised for purposes of oppression, or any injury wilfully done to person or property,

(26) Ibid. "Congress alone can declare war, and ... all other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage to be punished by prosecutions in the courts, or as insurrections, rebellions or domestic violence, to be put down by the civil authorities, aided by the militia, or when these prove incompetent, by the general government, when appealed to by the state for aid, and matters appear to the general government to have reached the extreme stage requiring more force to sustain the civil tribunals of a state, as requiring a declaration of war, and the exercise of all its extraordinary rights." - per Justice Woodbury.

the party by whom, ~~or~~ by whose order, it is committed would undoubtedly be answerable."

Two things must be remembered about this decision. It is not the judgment of the United States Supreme Court on the law of the Federal constitution. Chief Justice Taney while sitting in a federal circuit court was construing a Rhode Island statute. Secondly, Chief Justice Taney, it seems, revised his view on martial law powers in Ex parte Merryman.

(27)

The facts in Ex parte Merryman involved the arrest of the plaintiff by the military authorities. A petition of habeas corpus was made to Chief Justice Taney when on circuit in Baltimore, and the writ was issued. In response General Cadwalader sent an officer with a letter informing the court that he had been authorised by the President to suspend the writ and, therefore, further action should be postponed till he received instructions from the President. On the failure of a token attempt to attach the General for contempt, ^{C.J.} C. J. Taney delivered the opinion that under the Constitution only Congress had powers to suspend the privilege of the writ and the detention of the prisoner could not be sustained. Such a conclusion would seem strange not only on account of his pronouncements in Luther's Case, but also for his refusal to recognise that a commander, when war is raging, must have the power to hold persons in active opposition apart from the suspension of the writ

of habeas corpus.

(28)

In Ex parte Vallandigham counsel for the petitioner, who was tried by a military commission for uttering disloyal sentiments and sentenced to imprisonment for the duration of the civil war, moved the Supreme Court of the United States to grant certiorari and direct the Judge Advocate General to send up the record of the military commission. In refusing to grant the prayer, the Supreme Court held that a military commission did not form part of the judicial system of the United States and that the petition was not within the appellate jurisdiction of the court as defined by Article III of the Constitution.

(29)

The Prize Cases illustrate for the first time the President's power in relation to the exercise of martial law. President Lincoln did not wait for any congressional recognition of a state of war before he ordered the blockade of the seceding states. This was undoubtedly an act of state which stripped all the citizens of the affected states of their constitutional rights. As chief executive and commander-in-chief the President had power to suppress insurrection and could employ martial law to achieve this purpose. Justice Grier for a majority of the court said:

"The President was bound to meet it (the civil war) in the shape it presented itself, without waiting for congress to baptize it with a

(28) 1 Wall 243 (U.S. 1863).

(29) 2 Black 635 (U.S. 1862).

name; and no name given to it by him ~~or~~ them could change the fact ... Whether the President in fulfilling his duties ... has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the Government to which this power is entrusted."⁽³⁰⁾

This decision prescribing the limits of the President's powers was, however, soon qualified by the judgment of the United States Supreme Court in Ex parte Milligan⁽³¹⁾ in which the conception of martial law as resting on the war power and as measured by its rights was superseded by the British conception of it as a law of necessity to be determined ultimately by the ordinary courts. Here, Milligan, an American citizen and a resident in Indiana for twenty years, asked for his release from an alleged unlawful imprisonment. His contentions were that he was not, and never had been, in the military service of the United States and therefore could not be legally tried by a military tribunal. The military tribunal convened at Indianapolis by order of the General commanding the military districts of Indiana had sentenced him to death.

(30) Ibid, at pp.669-70.

(31) (1866) 4 Wall 2.

He claimed that as a citizen of the United States of America he had the right to a trial by jury guaranteed by the Constitution. The question was whether the military tribunal had the legal power and authority to try and punish him. As every trial involved the exercise of the judicial power, it had to be decided from what source did the military tribunal derive authority to try a civilian.

The American Constitution confers the judicial power "in one Supreme Court and such inferior courts as the Congress may from time to time order and establish." Neither could it be said that Congress established the military tribunal, nor such a tribunal could be justified on the mandate of the President, "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."⁽³²⁾ Nor was there any "unwritten criminal code to which resort can be had as a source of jurisdiction."⁽³³⁾ Justice Davies, in delivering the opinion of the majority, made the historic utterance:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during the great exigencies of government."⁽³⁴⁾

(32) Ibid.
 (33) Ibid.
 (34) Ibid.

If the claim be accepted that in time of war the commander of an armed force has the power "to suspend all civil rights and their remedies and subject citizens as well as soldiers to the rule of his will," it would destroy every guarantee of the Constitution, and effectually renders the military independent of and superior to civil power."⁽³⁵⁾

In a dissenting opinion ^{C.J.} R. Chase enunciated the classic definition of martial law. He visualised three kinds of military jurisdiction under the American constitution: "One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States as districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise." The first of these three jurisdictions is administered under military law of the United States and the second is known as military government. The third jurisdiction comes under martial law proper and "is called into action by Congress, as temporarily, when the action of congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts ~~or~~ localities where ordinary law no longer adequately secures public safety and private rights."⁽³⁶⁾

(35) Ibid.
(36) Ibid.

(37)

In one of the early cases *J. Story* of the United States Supreme Court had to consider the extent of the President's power in calling the militia into service in case of invasion or insurrection. The facts in this case were that a militiaman failed to respond to a call made under the Act of 1795 to serve during the war of 1815. He was convicted and his property was taken to satisfy the judgment. Under the Act the President was empowered by Congress to call up the militia in certain cases. Though this power to call the militia to active service was undoubtedly of "a very high and delicate nature," it was, in fact, a limited power exercisable during actual invasion or threatened invasion. It could not, therefore, be exercised without corresponding responsibility. If it was a limited power, the question arose, who was to judge the exigency? Was it the President or any officers to whom the President had delegated his power? *J. Story*, in holding that the authority to decide whether the exigency had arisen belonged exclusively to the President and that his decision was conclusive upon all other persons, said:

"He (the President) is necessarily constituted the judge of the existence of the emergency, in the first instance and is bound to act according to his belief of the facts ... whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction that

(37) Martin v. Mott (1827) 25 U.S. 19.

the statute constitutes him the sole and exclusive judge of the existence of these facts."

The principle enunciated here that the judiciary will not review an executive decision and substitute its own opinion where the legislature has lawfully empowered him to take any action on a designated occasion was recently applied in a case before the United States Supreme Court⁽³⁸⁾ involving the interpretation of tariff law. In this case it was contended that the judiciary had the power to review an error in the exercise of Presidential discretion under that law. In rejecting this argument Justice Douglas said:

"It has long been held that where Congress has authorised a public officer to take some specified legislative action, when in his judgment that action is necessary or appropriate to carry out the policy of the Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."⁽³⁹⁾

5. Martial Law Authorised by State Constitutions

Apart from the proclamations of martial law by the federal authorities during the civil war, martial law has often been resorted to by the state authorities. Thus, martial law was declared on an⁽⁴⁰⁾

(38) U.S. v. George S. Bush and Co. (1940) 310 U.S. 371.

(39) Ibid, at 380.

(40) The Proclamation ran as follows: "The Federal troops, the members of the police force, and all special police force officers have been authorised to kill any and all persons found engaged in looting, or in the commission of any other crime." Professor Ballantine discussed the validity of the measures adopted by the authority and found them unconstitutional.

outbreak of fire at San Francisco in 1906. The most interesting thing about the whole affair is that it was not the Governor of California nor any other appropriate executive or military authority, but the Mayor of the City of San Francisco who declared martial law. The record showed that at least ten persons were killed by soldiers when they violated the picket line in order to save their property.

Similarly, during the flood in Ohio, a company of the Ohio National Guard established a picket line surrounding a portion of the affected district with a view to preventing persons from going there without a military pass. One Smith, in defiance of the order, passed through the line to take some pictures and was arrested. On a petition for habeas corpus, the court of the Common Pleas held that the commanding officer could issue regulations for the protection of life and property and arrest any person trying to violate such orders.

Towards the end of the nineteenth century industrial disorders resulted in the armed forces being ordered to support the civil
(41)
authority. In these instances of martial law was proclaimed by the Governors of the States concerned and the armed forces claimed that

(41) Charles Fairman gives a fair picture of the clumsy modus operandi of the state executives used to keep the conflict between labour and capital within limits: "With exceptions and variations, the story tends to repeat itself. Labour organisers find themselves pitted against detectives and guards, and a grim struggle ensues; local magistrates prove lacking in power or zeal; presently the Governor declares that a state of insurrection exists, and perhaps adds that martial law shall prevail, and summons the militia. Then follows an anomalous regime - regulations are promulgated, saloons closed, weapons seized, newspapers suppressed or wrecked; agitators are arrested and detained, deported or perhaps tried by military commission." - Martial Rule and the Suppression of Insurrection (1929) 23 ILLINOIS LAW REVIEW 766 at p.768.

the proclamation of martial law involved the suspension of all the provisions of the constitutions, both state and federal.

(42)

The constitutions of four states expressly recognise the power to declare martial law. Besides, the Organic Acts governing Hawaii, the Phillipines and Puerto Rico contain express grant of power to the executive to declare martial law. (43) The constitutions of nearly twenty states provide that laws can be suspended only by the legislature.

Some of the states expressly declare in their constitutions that no person can be subjected to martial law or be punished except those in the army, navy or militia in actual service. (44)

Though there are provisions in the constitutions of several states recognising the exercise of martial law if necessity requires, it must not be supposed that they constitute grants of power; they are rather intended as limitations. (45) The state constitutions as well as

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- (42) Namely; Massachusetts, New Hampshire, Rhode Island and South Carolina. The Rhode Island Declaration of Rights provides: "The military shall be held in strict subordination to the civil authorities. And the law-martial shall be used and exercised, in such cases only, as occasion shall necessarily require."
- (43) Garner Anthony, Martial Law in Hawaii (1942) 30 CALIFORNIA LAW REVIEW 371.
- (44) Ballantine, Unconstitutional Claims of Military Authority (1915) 24 Yale L.J. at p.199.
- (45) Ballantine, Unconstitutional Claims of the Military Authority (1915) 24, Yale L.J. 202.

the various Declarations of Rights are subject to the provisions of the Federal Constitution. The exercise of martial law by the state authorities is, therefore, liable to be challenged before a Federal court and if it finds the exercise of power under a declaration of martial law contrary to any provision of the constitution of the United States it will declare such martial rule illegal and unconstitutional. On the supposition that a condition of war exists, a state government may declare martial law, but this raises the question whether a state can wage war on its citizens in the face of Article I, Section (46) 10, Clause 3 of the Federal Constitution. The state may, however, invoke Article IV, Section 4, under which the United States guarantees to every state a republican form of government and protection against invasion and rebellion. Still, the state authorities have to consider the provisions of the Fourteenth Amendment to the United States (47) Constitution.

(46) "No State shall, without the consent of Congress, engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

Charles Fairman, The Law of Martial Rule and the National Emergency (1942) 55 Har.L.R. 1253 at 1267. "But however loose the local law may have been found to be, the military acts of a state government, like all its other measures, are subject to the independent federal test of reasonable appropriateness imposed by the due process clause."

(47) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Extent of Authority under Express Laws

Some mention should be made of the powers conferred on the executive by special statutes enacted by the federal or state legislature. As has been evident from the foregoing discussions, the executive can, even in the absence of any express provision in the constitution or statute, act to maintain peace and order as it is charged generally to ensure public safety. In ex parte Milligan (48) it was held that "it is within the power of Congress to determine in ~~what~~ states or districts such great and imminent public danger exists as justified the authorisation of military tribunals for the trial of crimes against the public safety." In the commonwealth, Jamaica and Ireland had such especial statutes. Moreover, during the two world wars the British Parliament conferred extraordinary powers on the executive. "Such a statute would give additional security beside what might be derived from inherent executive power." (49) The aim of such legislation is to empower the executive to act, "not with an arbitrary discretion, but without applying mere technical rules: so as to do the substance of justice in (50) a summary way."

(48) (1866) 3 Wall (U.S.) 2.

(49) Charles Fairman, The Law of Martial Rule and the National Emergency (1942) 55 Harvard Law Review, 1253, at p.1264.

(50) Per J. Blackburn in R. v. Eyre (1868) Special Report, at p.81.

If there is a statute conferring specific powers, the Executive should restrict its action to the confines of the authority delegated for it will be within the power of the courts to nullify the excesses committed by the Executive. This general principle of judicial control of administrative agencies is equally applicable to the exercise of powers by the armed forces within the state. In a recent case the American Supreme Court said:

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and making their jurisdiction."⁽⁵¹⁾

6. Executive Discretion and its Abuse

In a number of decisions on the constitutional position of the

(51) Stark v. Wickard (1944) 321 U.S. 288.

(52) Ibid, at p.309.

state governor dealing with a breakdown of public order, the ruling
 (53)
 in the Prize Cases that the Presidential proclamation of martial law
 is conclusive of the ~~existence~~ of war and also of the legality of
 the measures adopted was invoked to uphold the Governor's action.
 The courts do not seem to have considered the prohibition in the
 Federal Constitution against a State waging war without the consent
 of Congress, nor the duty of the Federal Government to make good the
 (54)
 guarantee in Article IV, Section 4.

It has, however, been held that a power to do an act implies a
 power to select the means of doing it. Chief Justice Marshall in the
 (55)
 famous case of Maryland v. McCulloch said: "The Government which has
 a right to do an act, and has imposed on it the duty of performing
 that act, must, according to the dictates of reason, be allowed to
 select the means ... that any means adopted to the end, any means which
 tended directly to the execution of the constitutional powers of the
 (56)
 government, were in themselves constitutional."

(57)
Ela v. Smith is the leading case which recognised the freedom

(53) 2 Black 635 (U.S. 1863).

(54) Article IV, Section 4, lays down - "The United States ... shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

(55) 4 Wheat U.S. 316 (1819).

(56) The general principle discussed here was applied in relation to the President's power regarding martial law in the Prize Cases and his power to call militia in Martin v. Mott (1827) 25 U.S. 19.

(57) 71 Mass. 121 (1855).

of the executive to choose the method to attain a particular object with which it is commissioned. Here, the Mayor of Boston, in the exercise of his discretion, called the militia to prevent a riot over the return of a fugitive slave. When one of the crowd attempted to break through a cordon of soldiers, he was injured; he brought suit to recover damages. It was there held:

"Whenever the law vests in an officer as magistrate a right of judgment, and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises within the limits of his jurisdiction a judicial authority. So long as he acts within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals in the discharge of their appropriate functions. Of these none is better settled than the wise and salutary rule of law by which all magistrates and officers, even when exercising a special or limited jurisdiction, are exempted from liability for their judgments, or acts done in pursuance of them, if they did not exceed their authority, although the conclusions to which they arrive are false and erroneous."

(58)

In Re Boyle the Supreme Court of Idaho, in refusing to issue a writ of habeas corpus, held that the governor's declaration was conclusive of the state of war and that the measures adopted by him were necessary to accomplish the object of suppressing the insurrection.

The court was of the opinion "that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive as far as the military officer in command, if there be such, either to suspend the writ or disregard it, if issued." The court denied jurisdiction to review such decision or interfere with the executive process. "It would be an absurdity to say that the action of the executive, in such circumstances, may be negatived and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary." (59)

Industrial unrest and the need to control and regulate the relationship between labour and capital led the Governor to declare a part of Colorado to be under martial law. Press censorship was imposed; persons were deported and detained; persons considered to be responsible for the insurrection were arrested. The plaintiff, a Union leader, was arrested and detained for 76 days. On an application for a writ of habeas corpus, the Supreme Court of the state held that the detention was not illegal. The court did not consider that the Governor had the power to suspend the writ. (60)

Subsequently, on his release when the insurrection was over, the plaintiff brought an action for damages against the Governor.

(59) Ibid.

(60) In re Moyer (1904) 35 Calo. 159

The federal circuit court held that the Governor's action did not show any abuse of power; there had been no violation of the Fourteenth Amendment.

On an appeal to the United States Supreme Court, Justice Holmes, speaking for the court, conceded that at the time of the declaration the courts were open, but he concluded that the Governor's declaration was conclusive of the existence of an insurrection. (61)

As the constitution and statutes of the state empowered the Governor to employ the National Guard to suppress insurrection, he could "make the ordinary use of the soldiers to that end, kill persons who resist" and "use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace." (62)

Further, though the arrest may have been without reasonable ground it will be justified if the measure was necessary and made "in good faith." "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." (63)

The law allows the subsequent challenge before the court of the conduct of men responsible for such extraordinary rule but in that

(61) Moyer v. Peabody (1909) 212 U.S. 78.
 (62) Ibid.
 (63) Ibid.

case the court should duly weigh the executive discretion and judge the matter on the facts existing at the moment and not in the manner of the cool and calm atmosphere of a court-room. (64) "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." (65)

(66)
In the leading case of Sterling v. Constantine the United States Supreme Court considered the legality of the military action taken by the Governor of Texas in taking over the properties of the respondent. The Texas legislature authorised the railroad commission to limit the production of oil. On a petition for an injunction the federal district judge raised a temporary restraining order and constituted a three-judge court. In order to overcome the difficulties caused by the judicial proceedings, Governor Sterling declared a state of insurrection and appointed General Wolters to suppress it by martial law. There was actually no disturbance, no uprising, or interference with the civil authorities or the courts. (67) In the absence of any such violence or

(64) Ibid.

(65) Ibid.

(66) (1932) 287 U.S. 378

(67) Constantine v. Smith, 57 F. 227 at 231; "It was conceded that at no time has there been any actual uprising in the territory. At no time has any military force been exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with or their processes made impotent."

attempted violence, could the executive "good faith" as advocated and approved in the Moyer's case be proved? Martial rule would in such a case be clearly illegal. And so it was, as quite emphatically declared by the three-judge court.

Expressing the inability to accept the contention of the appellant that the court was powerless to intervene since the Governor's order had the quality of a supreme and unchallengeable edict, Ø. J. Hughes C.J. of the American Supreme Court said: "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a State Governor, and not the Constitution of the United States, would be the
(68)
supreme law of the land."

If the Governor would exercise such uncontrolled power upon his assertion of necessity, the restrictions imposed by the Federal Constitution would be but impotent phrases. Ø. J. Hughes C.J. said:

"Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount
(69)
authority of the Federal Constitution."

If there is a challenge to such arbitrary exercise of powers, the court will always interfere. "When there is a substantial showing that the exertion of state power has overridden private rights secured

(68) Sterling v. Constantine (1932) 287 U.S. 378 at p.397.

(69) Ibid, at p.398.

by that constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."⁽⁷⁰⁾

In applying these principles the court must not disregard the distinctive authority of the state. "In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise."⁽⁷¹⁾

Since the Governor has the duty to maintain law and order, it is incumbent that he should be allowed the freedom to act and take all necessary measures to that end. So long as the Governor's act cannot be challenged on the ground of lack of good faith and bears a reasonable relation to the emergency in question, it cannot be declared unjustified and illegal. Thus, *Ch. J. Hughes* said:

"The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless."⁽⁷²⁾

Then, he goes on to say that "such measures conceived in good faith, in the face of the emergency and directly related to the quelling

(70) Ibid, at p.398.

(71) Ibid, at p.399.

(72) Ibid, at p.399-400.

of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace."⁽⁷³⁾

The reasons stated above led to the conclusion that there was no emergency which compelled the Governor to resort to martial law and nullify the order of the District Judge. On the contrary it was the Governor's duty to uphold the majesty of law.

"If it be assumed that the Governor was entitled to declare a state of insurrection and bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove and not to create obstructions to the exercise by the complainants of their rights as judicially declared."⁽⁷⁴⁾

The decision goes to establish that though the executive will be allowed discretion in exercising martial law powers "upon sudden emergencies, upon great occasions of state," it has to be proved that such discretion was exercised in good faith.

(73) Ibid, at p.400.

(74) Ibid, at p.404.

CHAPTER 5GENERAL PROBLEMS OF LAW AND ORDER1. Duty of Citizens and Soldiers in Restoring Order

Our discussion on the Crown's prerogative or the common law power to suppress disorder has rendered it essential to deal with another matter of equal constitutional importance. In relation to a riot in time of peace and during a state of rebellion, the duty of the citizens, as we shall presently see, remains the same, but our immediate purpose is to discover the difference in the duty of the soldier towards the civil population in the two different situations.

Whether it is peacetime or wartime, so far as the suppression of disorder is concerned, the common law makes no distinction in this respect between the duties of citizens and soldiers. In a charge to the Bristol Grand Jury on the occasion of riots in that city, *C. J. Tindal C.J.* said:

"By the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction of the magistrate, to suppress a riot by every means ... It is his bounden duty, as a good subject of the King, to perform this to the utmost of his
(1)
ability."

He was not, however, unconscious of the proper implications of the situation. For all practical purposes the citizens, if they do

(1) Charge to the Bristol Grand Jury, quoted in Rex. v. Pinney 5 Car and Payne at p.262.

anything at all, will merely help the officers of the King in re-establishing peace and order. "It would be more discreet for everyone in such a case to attend and be assistant to the justices, sheriffs or other ministers of the King." But where no opportunity was given for acting on the advice or sanction of the magistrate and immediate action was necessary, every subject could act on his own responsibility in suppressing a tumultuous assembly. "Whatever is honestly done by him in the execution of that object will be supported and justified by the common law."

When the paramount consideration for a magistrate is the restoration of order, he "may call on all the King's subjects to assist him and all the King's subjects are bound to do so, upon reasonable warning."

It is thus only in degree and not in kind that the powers of the armed forces are different from those of the ordinary citizens.

(2) Ibid.

(3) Ibid, quoted in Rex v. Pinney.

(4) Ibid.

(5) "When called to the aid of civil power, soldiers in no way differ in the eyes of the law from other citizens, although, by reason of their organisation and equipment, there is always a danger that their employment in aid of the civil power may in itself constitute more force than is necessary." British Manual of Military Law (1955) Part II, Section V, p.1.

Under the ordinary law of the land the citizens and the soldiers are alike bound to help in maintaining peace and normal conditions in time of war as well as in peace.

In cases of ordinary breaches of peace, such as an affray or a riot or any more or less peaceful demonstration or strike, the civil authorities generally retain full control over the situation. It is only in time of rebellion or invasion that the military forces are entrusted with full powers to direct the whole energy of the State in ~~repel~~ repelling the invasion or subduing the rebellion. Only when war conditions exist will the soldiers be considered the best judges of the steps taken to deal with them. They can then give all necessary orders to the civilians and impose restrictions on them to discharge the supreme obligation.⁽⁶⁾ But, when the armed forces are called in aid of the civil power, they are normally expected to act when so ordered by the civil authority. "The task of dispersing riotous assemblies in time of peace is best directed by the local authorities who have knowledge of local conditions. Normally an officer in command of troops will act only if called upon to do so by a magistrate."⁽⁷⁾

It goes without saying that though the instructions of the magistrates will greatly influence his judgment, it is also incumbent that "he must exercise his own judgment whether to use force and, if so, how much force to use."⁽⁸⁾

((6) Chapter VI.

(7) Wade and Phillips, Constitutional Law (1955) at p.421.

(8) Ibid.

To sum up, the common law imposes the same obligations on the soldiers and the citizens. These obligations are, firstly, to come to the aid of the civil power when the latter requires their assistance to maintain law and order, and, secondly, not to use greater force than is necessary. The obligations are equally applicable in every type of disturbance.

2. The Principles Governing the Exercise of Powers by the Public Authorities

Where, in a case of a riot not amounting to rebellion, the extent of the powers of the public authorities are not defined by the statute, the choice before them being more limited than those of the armed forces engaged in suppressing a rebellion, interesting questions regarding neglect of duty and excess of jurisdiction arise. If the magistrate or other person responsible fails to take proper precautions to preserve the peace or uses more force than necessary to restore order, he is both civilly and criminally liable. As, during a rebellion which practically amounts to a state of war, the necessity is greater, the position of the armed forces employed to restore order is also different. Their discretion will be more free. "A proclamation of martial law during a rebellion, or shortly before it has been entirely quelled, practically gives to those in authority full powers to do all that is necessary to restore order. (9) Yet, it must not be supposed that the armed forces can,

(9) Sir William Holdsworth, Martial Law Historically Considered, 18 Law Quarterly Review at p.126.

during a proclamation of martial law, exercise powers not justified by the exigency. Unless subsequently protected by indemnifying legislation, the members of the armed forces may also be liable, both civilly and criminally. Even an Act of Indemnity, as we shall see, cannot relieve them for acts not done in good faith.

The dilemma facing a magistrate who has the duty to suppress any disturbance of peace is two-fold. If his order causes death, he is liable to be indicted for murder or manslaughter but if, due to his omission to act, the mob causes injury to other persons or their property, he may be charged with neglect. The consideration that must guide his conduct in such cases is, as J. Littledale said, "to hit
(10)
the precise line of his duty." But to do that is, however, very difficult. When law requires of him such a high standard of judgment, it will be no defence that what he did was inspired by the best of motives. The honesty of intention will, no doubt, be good evidence to show that "he has fulfilled his legal duty by doing or abstaining from doing all that can reasonably be expected from a man of honesty and ordinary
(11)
prudence."

Neither good feeling and upright intention nor his having acted under the advice of others will be an answer to a neglect of duty on the magistrate's part. "The question is, whether he did all that he

(10) The Trial of Charles Pinney (1832) 3 State Trials (New Series) at p.510.

(11) 18 Law Quar. Review at p.130.

knew was in his power, and which could be expected from a man of
 ordinary prudence, firmness and activity." (12) Fear of his own personal
 safety would not be a good defence, unless such fear was rational. "If
 on a riot taking place, a magistrate neither reads the proclamation
 from the Riot Act, nor restrains nor apprehends the rioters, nor gives
 any order to fire on them, nor makes any use of a military force under
 his command, this is prima facie evidence of a criminal neglect of duty
 in him: and it is no answer to the charge for him to say that he was
 afraid, unless his fear arose from such danger as would affect a firm
 man; and if, rather than apprehend the rioters, his sole care was for
 himself, this is also his neglect." (13)

Once a decision to take action has been made on whom lies the
 responsibility if troops are employed to suppress the disturbances?
 It is true that the primary duty to maintain order rests with the
 magistrate and the commander of the troops must act under his direction,
 but the magistrate may not know the nature of the weapons at the
 disposal of the troops. In such circumstances "a magistrate, there-
 fore, if he acts with discretion, will necessarily defer to the
 opinion of the commander on military matters, particularly as to the
 degree of the force to be used." (14) When, however, the commander is

(12) Rex v. Pinney, 5 Car and Payne 254: 172 English Reports 962
 (1781).

(13) Rex v. Kennet 5 Car and Payne 282: 172 English Report 976
 (1781).

(14) British Manual of Military Law (1955) Part II, Section V,
 page 2.

requested by the magistrate to take action, it is for him to decide the amount of force required in the circumstances. The commander "would incur considerable responsibility if he were to fire without a request to take action from the magistrate or if he were to refuse to fire when requested to do so, but circumstances which he sees before him might justify a commander in firing, or not firing, notwithstanding the request which he receives from the magistrate." (15) It is, therefore, for him to decide whether it is necessary to fire or not, because he will be responsible for his action.

3. The Role of the Soldiers during Disturbances

(a) Soldiers do not cease to be citizens

It is a mistake to suppose that the citizens, by enlisting themselves in the army, cease to be citizens. The soldiers cannot shake off any of the rights and duties of the citizens. "A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner." (16) As such they are as much bound to help in maintaining peace and order as the other citizens. The mistaken notion "that because men are soldiers they cease to be citizens" in 1780 produced the alarming result that "soldiers with arms in their

(15) Ibid.

(16) Report of the Commission on the Featherstone Riots (1893)
Appendix.

hands stood by and saw felonies committed, houses burnt and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them without interfering." (17)

The reasons for their inaction were that there was no officer, civil or military, to give them the command. To choose to remain silent spectators when such outrages were being perpetrated cannot be the duty of soldiers for, as Lord *C. J.* Mansfield, the great expounder of common law, said, "if it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed." (18)

C. J. Tindal made observations to the same effect when he said that "the soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject." (19)

On comparing the rights and duties of the soldiers and citizens in relation to maintenance of order *C. J.* Tindal reached the following conclusion:

"If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when

(17) Burdett v. Abbot (1812) 4 Taunt 401: 128 English Reports 384.

(18) Ibid, at 450.

(19) Charge to the Bristol Grand Jury (1832) quoted in 5 Car and Payne 262.

the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force."⁽²⁰⁾

(b) Soldiers can interfere without a proclamation of Martial Law

No proclamation of martial law or the exercise of the royal prerogative is needed to justify the use of the armed forces to suppress riots and other similar disturbances. The sort of military interference which one may experience when the armed forces are called in aid of the civil power does not necessarily usher a regime of martial law. They may, however, be invested with additional powers by the legislature, without establishing military rule in the disturbed area. "The powers of the military, coming to the aid of the civil authorities, would seem in general to be limited to what peace officers may do, unless valid statutes give them additional powers."⁽²¹⁾

When soldiers come to the assistance of the civil authority they

(20) Ibid. In Grant v. Gould (1792) 2 H.B.L.98, Lord Loughborough said: "In this country all the delinquencies of soldiers are not triable as in most countries in Europe, by martial law, but where they are ordinary offences against the civil peace, they are tried by the common law courts." By "martial law" Lord Loughborough meant the military law of today.

(21) Ballantine, Unconstitutional Claims of Military Authority, 24 Yale Law Journal 189 at 212 (1915).

are bound by the ordinary law of the land. In his speech before Parliament on the employment of the army to suppress the Gordon Riots of 1780, Lord ^{C.J.} Mansfield said:

"My Lords, we have not been living under martial law, but under that law which it has long been my sacred function to administer ... supposing a soldier, or any other military person who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt that he may be punished, not by court-martial but upon an indictment."⁽²²⁾

It is therefore essential to remember that to suppress ordinary disturbances soldiers come to help the civil power, not as soldiers but as citizens. "They were employed (no matter whether their coats were red or brown) not to subvert, but to preserve the laws of the Constitution which we all prize so highly."⁽²³⁾ Lord Mansfield, therefore, dismissed as groundless the idea that since the army was employed to quell the Gordon Riots the citizens were "living under a military Government, or that since the commencement of the riots, any part of the laws of the Constitution" had been suspended or dispensed with."⁽²⁴⁾

(c) Exercise of powers by the Army is more for preventive than punitive purposes

The obligation to preserve order and suppress disturbances may at times seem so high that one may tend to forget the distinction

(22) 3 Campbell, Lives of the Chief Justices 415, quoted in 24 Yale Law Journal at p.211.

(23) Ibid.

(24) Ibid.

"between the power of a policeman to arrest and the power of a policeman to constitute himself a court or legislature and try and convict, sentence and execute offenders for violations of law or of his own orders." (25) The assumption of such power by the executive or the military authority is not tenable for the simple reason that the power of adjudication and punishment is a judicial and not an executive power.

The assertion of the power to arrest and detain persons committing riot and violence has been conceded in cases of necessity though, as we shall see, the problem whether a military tribunal can try civilians, if presented for judicial inquiry, raises difficulties. The whole question has to be then resolved with reference to the conditions prevailing in the area. Some acts may be justified; others may not be supported upon any accepted standard of justification.

Broadly speaking, however, when martial law has not been proclaimed, the power of the military authority remains preventive. Their powers, as an American writer has observed, "would seem to be preventive, defensive and ministerial, with no authority to issue orders to citizens generally, or to punish those who disobey commands or commit offences." (26) It is here worth mentioning that the common law would also justify the destruction of property, for example, to prevent public danger. The maxim Salus populi suprema lex would give ample scope to such common law

(25) Ballantine, Unconstitutional Claims of Military Authority, 24 Yale Law Journal at 212 (1915).

(26) Ibid, at p.213.

justification of necessity. Even then while the common law doctrine of necessity admits that extraordinary measures may be adopted during abnormal circumstances, it also equally insists that they must be limited by the reasonable necessities of the occasion.

Though the law is clear that, when called by the civil authority, soldiers must come to their assistance, they cannot commit any excess, not even if they are asked to do so. "No excess of force or display must be used, and a soldier is guilty of an offence if he uses that excess, even under the direction of the civil authority, unless the circumstances are such that he has no opportunity of ascertaining and judging the facts of the case for himself and is therefore compelled to accept the opinion and appraisal of the situation of the civil authority concerned."⁽²⁷⁾

(d) Principles governing the use of firearms against citizens

The question whether in a particular situation a recourse to firearms is actually necessary presents some obvious difficulty. If it can be proved that the situation was really menacing and slipping out of control, the firing would have to be justified by necessity. This can, of course, be determined by applying an objective standard. But it is the subjective opinion of the officer commanding the armed forces which almost always is advanced as proving the dangerous and violent nature of the disturbances. No-one will quarrel with the

(27) British Manual of Military Law, Part II, Section V, at p.1 (1955).

proposition that the officer put in charge of restoring order must have all the necessary freedom to deal with the situation and his subjective apprehension must be given due weight and consideration but it is only the objective basis of his fear which should justify a recourse to arms.

(28)

In Lynch v. Fitzgerald, an Irish case, J. Hanna considered at length the principles governing the use of firearms against an assembly of civilians causing a breach of the peace. The plaintiff claimed damages under the Fatal Accidents Act, 1846, for the death of his son, who was killed by a bullet fired by one of a group of detectives of the Special Branch of the Civic Guards. For the protection of certain prospective buyers against a threatened demonstration at a sale of cattle seized under a warrant from the Irish Land Commission, a force of 200 guards including 12 armed detectives were placed around the scene. A crowd of nearly 1500 men gathered some time before the hour fixed for sale. The three defendants opened fire when a lorry carrying men with sticks came through the crowd and crashed into the gate of the yard and succeeded in breaking through it. In the course of the firing the plaintiff's son was killed.

Without concerning himself with the cases "where there was, in the old legal phraseology, 'a cry made for weapons to keep the peace', and ... where the soldiers of the regular army have fired upon civilians with or

without orders," J. Hanna proceeded to state clearly the law on the subject of involving the loss of civilian life at the hands of the armed forces of the State. According to him, the defendants must be regarded as part of the Armed Forces of the State, though their recruiting, control, discipline and training were very different from those of the members of the regular Forces. As such they "fall, just like the members of the regular Army, under all the duties and liabilities of an ordinary citizen in the use of arms, nor are they exempt from the ordinary process of law." (29) He referred to some authorities dealing with the (30) limitations upon the right to fire upon an unlawful assembly and came

(29) Ibid, at p.401.

(30) J. Hanna quoted the following relevant portions from the Report of the Special Commission (consisting of Lord Shaw of Dunfermline, Lord Chief Justice Molony and Mr. Andrews, formerly the Right Honourable Mr. Justice Andrews) upon the Bachelor's Walk Shooting: "Para 35: The military should only, and legally can only, be convened to interfere with, quell, or disperse an unlawful assembly if that assembly is unlawful in the sense that it has committed, or threatens to commit, serious and violent crime: as, for instance, setting fire to, or destruction of, buildings or property, killing or maiming or seriously injuring persons ... In such cases the public peace may demand that such conduct should be stopped or such depredations or violence be prevented. Para 37: The military cannot be brought in whenever it can be said that there is a gathering of persons whose object is illicit. The unlawfulness must be something akin to riot, violent disturbance, or crime, or resistance to the execution of the law, to avert which military aid is sought as a last and imperative resort. It is to such an unlawful assembly that the law applies. Para 38: Even in the extreme class of cases there is still room for the exercise of a wise, scrupulously careful, and a forbearing exercise of discretion. The use of firearms, instead of composing a crowd, does much to inflame the passions of the crowd and, instead of quelling the riot, may do much to disturb the King's peace. And unfortunately the passions are not confined to one side, and the armed forces may yield to impulses and commit indiscretions which lead to lamentable results."

to the conclusion that the armed forces could fire upon a riotous assembly only where such a course was necessary as a last resort to preserve life. He traced the principle of repelling force by force to the common law which established the proposition that "it is lawful to use only a reasonable degree of force for the protection of oneself or any other person against the unlawful use of force, and that such repelling force is not reasonable if it is either greater than is requisite for the purpose or disproportionate to the evil to be prevented."

J. Hanna did not stop by merely determining the civil liability of the defendants and awarding a damages of £300, but directed for a jury trial in which their criminal liability may be determined. In drawing the attention of the Attorney-General to the necessity of such an investigation J. Hanna said: "This investigation of the criminal liability is all the more necessary as the three defendants belonged to the Armed Forces of the State and there cannot be one rule for them, when their acts result in the death of a citizen, and another in the case of a motor driver who causes a death and has to stand his trial before a jury."⁽³¹⁾

On an appeal by the defendants to the Supreme Court of Ireland, J. Meredith defined the character of the situation which justified recourse to arms. According to him the matter was "merely one of forbearance and restraint and the preservation of a due proportion between the means adopted and the end to be attained." If calm judgment was

(31) Ibid, at pp.407-8.

impossible due to the excitement created by the emergency and the need to frustrate at all costs the pursuit of an object which sought to overpower the forces of the State was apparently most urgent, allowances must be made for the quality of the decision of the officer entrusted with the life and property of the citizens. As it is only a matter of opinion whether immediate action was necessary, such opinion must be based on the proper assessment of the situation. Thus J. Meredith said:

"If the opinion that led to action was occasioned by an actual development in the situation, if it was reasonable under all the circumstances and afforded a sufficient ground, then the action was justified as a practical necessity, even though a Court of law, calmly deliberating on the development of the entire situation as disclosed by the evidence of witnesses from all quarters of the scene, might feel bound to hold that objectively the use of firearms was unnecessary and premature." (32)

(e) Conflict between the duties: the Protection of subordinates acting by orders of superiors

The dilemma which confronts a soldier in suppressing riot or disorder in time of peace is a peculiar one. As Dicey observed, "he may be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it." (33) This is an awkward position.

(32) Ibid, at p.422.

(33) A. V. Dicey, The Law of the Constitution, Tenth ed., at p.303 (1959). Similarly Stephen said: "By the ordinary principles of the common law they are, speaking generally, justified only in using such force as is reasonably necessary for the suppression of a riot. By the Mutiny Act and the Articles of War they are bound to execute any lawful order which they may receive from their military superior, and an order to fire upon a mob is lawful

There has been as yet no clear-cut decision on this important problem. (34)

In cases of doubt "probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons." (35)

if such an act is reasonably necessary. An order to do more than might be reasonably necessary for the dispersion of rioters would not be a lawful order. The hardship upon soldiers is, that if a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than was reasonably necessary has to be decided by a jury, probably upon a trial for murder; whereas, if he disobeys his officer's orders to fire because he regards them as unlawful, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier for disobeying orders, and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity and therefore as to the lawfulness of such an order." Sir James Fitz-James Stephen, History of Criminal Law in England, Vol. I, p.204 (1883). Also recently, the same views were expressed: "The defence of obedience to the orders of a superior is not accepted by the civil courts. On the other hand, if a soldier disobeys an order on the ground that it is unlawful, a court martial may hold that it was lawful." Wade and Phillips, Constitutional Law, Fifth ed., at p.420-21 (1955).

(34) "I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined." Sir James Fitz-James Stephen, History of the Criminal Law of England, Vol. I, at p.205 (1883).

(35) Ibid, at p.205.

Forsyth has attempted to answer some of the questions as to the duty of soldiers in such cases as we have considered as follows:

(1) What is the law with regard to a soldier firing upon a crowd and causing death?

"There can be no doubt that if the occasion justifies the command to fire, he is bound to obey it, and is not liable for the consequences. To disobey it would subject him to severe punishment, perhaps death, by court-martial."⁽³⁶⁾

(2) What is the course open for a soldier when the occasion does not justify the command - in other words, the order to fire is improperly given?

"A soldier is here placed in a most difficult dilemma. On the one hand, it is his military duty to obey the orders of his commanding officer; on the other, he has by becoming a soldier not ceased to be a citizen, and is subject to the duties of a civilian. It is clear that he would not be justified in obeying every command of his superior; as for instance - to put an extreme case - supposing he were ordered to fire upon the Sovereign, or to desert to the enemy, or to commit a rape. There he must instantly recognise the form of a paramount obligation,⁽³⁷⁾ and see that disobedience is a duty."

(3) What is his position when the command, though illegal in the eye of law, is not obviously so?

(36) William Forsyth, Cases and Opinions on Constitutional Law, at p.215 (1869).

(37) Ibid, at p.215.

"In such a case he surely ought to be held harmless for obeying
(38)
it."

(4) What is his duty when he conscientiously believes the order to be illegal, but in fact it is not so?

"If he disobeys it, he would be tried and punished by a court-martial, and properly so; for it would be dangerous to allow a soldier to shelter himself against the charge of disobedience on the plea that he mistakenly believed the order of his commanding officer to be
(39)
contrary to law."

(5) Will he be liable if he disobeys an order which is illegal but not obviously so, as in the case of a command to fire where there is a riot, but not such violence as to justify the use of military weapons?

"Here he would only have done that which as a citizen he was bound
(40)
to do, namely to abstain from murder."

(6) Would he have committed an offence against the Articles of War which provide that any officer or soldier who shall disobey the lawful command of his superior officer, suffer death, or such other punishment as by a general court-martial shall be awarded; and if a soldier, shall suffer death, transportation (now penal servitude) or such other punishment as by a general court-martial shall be awarded?

(38) Ibid, at p.215.

(39) Ibid, at p.215.

(40) Ibid, at p.215.

"A court-martial could not find him guilty of disobedience if the command was not lawful. Perhaps, upon the whole, the right conclusion is this: a soldier may disobey an unlawful command, but he is justified in obeying all orders of his commanding officer, unless they are obviously, and in a manner patent to common sense illegal. The habit of discipline and obedience in a soldier is, I believe, more essential to the well-being of the State, than the possibility of his now and then
(41)
executing an illegal order is injurious to it."

How do the soldiers know whether the orders of their officer are legal or not? One could only suppose that this was possible by applying ordinary common sense. As Justice Stephen has said: "Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire down a crowded street when no disturbance of
(42)
any kind was either in progress or apprehended." Even from the standpoint of army discipline, obedience to the orders of the superior officer should not in every circumstance be considered essential. "The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by

(41) Ibid, at p.215.

(42) Sir James Fitz-James Stephen, History of the Criminal Law of England, Vol. I, p.205 (1883).

the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior." (43) Further, in the opinion of Justice Stephen, "it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children during a rebellion." (44) In all cases of conflict, reasonableness would seem to be the best standard in determining a soldier's course of action. "The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds." (45)

Some English judges experienced the same difficulty in determining how far the orders of a superior officer were a justification. Thus, in Keighley v. Bell, (46) which held that, if the order was not apparently illegal, the soldier who obeyed it was not criminally liable, J. Willes J. said:

"Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual

(43) Ibid, at p.205.

(44) Ibid, at pp.205-6.

(45) Ibid, at p.206. "Although a soldier remains subject to the common law duties of the ordinary citizen, the fact that he is a soldier influences the attitude of the courts towards certain acts of his which bring him within the civil jurisdiction. They take account of his duties as a soldier to this extent, that they will not hold him liable for an act done in obedience to an order given by his military superior and not manifestly illegal at the time it was given. It would not, however, necessarily relieve him of civil responsibility." Keir and Lawson, Cases in Constitutional Law, at p.389 (1954).

(46) (1866) 4F. 8F. 763: 176 English Reports 781

war - at all events as regards enemies or foreigners - and, I should think, even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is that an officer or soldier, acting under the orders of his superior, not being necessarily illegal, would be justified by his orders."⁽⁴⁷⁾

But where such orders were manifestly illegal the judges did not hesitate to declare that the soldiers were liable.

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In R. v. Thomas the prisoner, a sentinel on board H.M.S. Achille, had been told to keep off all boats unless they carried officers in uniform or were allowed by the officer on deck to approach. One of the boats which did not come within the above description came close to the ship. The man inside the boat was warned but, on his persistent advance, was fired at and killed. The jury found the prisoner not guilty, as he fired under the mistaken impression that it was his duty, but the judges were unanimous that it was murder. The act was not necessary for the preservation of the ship.

⁽⁴⁹⁾

R. v. Maxwelll, a case decided by the High Court of Justice in Scotland, lays down that a mistaken impression of duty will not excuse an officer if he, without being justified by other circumstances, orders his men to fire, and someone is thereby killed. A French prisoner of war

(47) Ibid. According to Professor Hood Phillips "if modified to the extent that the soldier's belief in the lawfulness of the order must be reasonable, J. Willes's opinion would probably be accepted by the legal Profession." The Constitutional Law of Great Britain and the Commonwealth, 2nd ed., at p.302 (1957).

(48) Russell on Crimes, 8th ed., p.774 (1815).

(49) (1809) Buch., Part II, p.3.

was killed when the accused improperly ordered a sentinel to fire into the room where he and other prisoners were confined. At the time of firing there was no symptom of disorder in the prison. The general instructions which regulated the conduct of troops guarding the prison did not contain any such order as empowered the accused Maxwell to act in this manner. The Lord Justice Clerk held that Ensign Maxwell "could only defend himself by proving specific orders, which he was bound to obey without discretion, and which called upon him to do what he did." The jury found him guilty of the minor offence of culpable homicide with a recommendation to mercy. He was sentenced to nine months' imprisonment.

(50)

In R. v. Smith, a case arising in South Africa, J. Solomon refused to adopt as a rule either of the two following propositions:

"A soldier is responsible by military and civil law, and it is monstrous to suppose that a soldier would be protected where the order is grossly illegal. The Court cannot therefore decide that a soldier is bound to obey any order that may be given him. Then there is the second proposition: that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal. That is an extreme proposition which the Court cannot accept for its guidance." (51)

War broke out in November 1899 and the enemy entered Cape Colony. Martial law was proclaimed in the district of Colesburg where the

(50) (1900) 17 Cape of Good Hope Report 561. This case was heard before the Special Court established by Act 6 of 1900. The constitution of the Court was Mr. Justice Solomon, (President) Mr. Justice Lange and Mr. A. F. S. Maasdrop. There was no jury.

(51) Ibid, at p.567.

alleged murder took place. A patrol consisting of thirteen men proceeded on a dangerous expedition and on reaching a farm, they stopped for a short rest. When it appeared that one bridle was missing, the deceased was asked by the Captain to fetch the bridle. As he delayed in getting it, the prisoner shot and killed him on the orders of the Captain.

The Court did not find whether the Captain's order was in fact legal but held that the prisoner was bound to obey it "as long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, or to the well-known established customs of the
(52)
army."

The difficulty in which the soldier is placed is inherent. Justice Stephen said: "The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law and on the other the discipline of the
(53)
army."

4. Legislative Indemnity

(a) Its Meaning

On the determination of a period of disturbance such as rebellion or invasion, it is usual for Parliament to pass Acts of Indemnity for

(52) Ibid, at p.567.

(53) Sir James Fitz-James Stephen, History of the Criminal Law of England, Vol. I, at p.206 (1883). "It is probably better to leave the soldier in a position of difficulty than to place him outside the ordinary law." Wade and Phillips, Constitutional Law, Fifth ed., at p.421 (1955)..

the protection of officials for their acts during the disturbance. "It is customary for Parliament to pass Acts of Indemnity after the occasion is over, perhaps because the existence of the prerogative is doubtful, and certainly because it is necessary to protect persons who have acted bona fide in a time of war or insurrection. Such Acts usually substitute a right to compensation from the public funds. They are not generally so drawn as to protect persons who have acted mala fide and without due regard to humanity." (54) They are "the best-known examples of ex post facto legislation." (55)

(56)
In Phillips v. Eyre J. Willes enumerated the occasions when from the fourteenth century onwards the British Parliament passed Acts "indemnifying those who took arms to maintain the authority of the Crown, and of putting an end to occasions of discord, even by way of general Act of oblivion, prohibiting civil suits and criminal prosecutions in respect of acts done in the course of a rebellion." He then cited various instances when the Dominion and colonial legislatures passed such enactments. The gist of the matter in the English Acts seemed to be that it was "reasonable that acts done for the public service, though not justifiable by the strict forms of law, should be justified by Act of Parliament." (57)

Enunciating the principle of Acts of Indemnity J. Willes said

(54) Halsbury's Laws of England, Vol. III, 3rd ed., at p.261-2.

(55) Sir C. K. Allen, Law and Orders, at p.46 (1956).

(56) (1870) 6 Q.B.1.

(57) Ibid, at p.17.

that its aim was to provide "indemnity for what was done in zeal for
 the public service, and a politic oblivion of the past."⁽⁵⁸⁾ Earlier, he
 narrated the difficulty a Governor might have to face in stamping out a
 rebellion, if the moment all trouble was over he and those who acted
 under his orders were exposed to harassing and ruinous litigation.
 In the opinion of J. Willes, it seems that, under these and like circum-
 stances, the legislature is competent to authorise "by antecedent
 legislation the acts done as necessary or proper for preserving the
 public peace, upon a due consideration of the circumstances, to adopt
 and ratify like acts when done, or in the language of the law under
 consideration to enact that they shall be 'made and declared lawful
 and confirmed'. "⁽⁵⁹⁾

Acts of Indemnity are, therefore, ex post facto ratification or
 recognition of acts as lawful which, but for such Acts, would have been
 unlawful. Thus, Dicey defines them as "retrospective statutes which free
 persons who have broken the law from responsibility for its breach, and
 thus make lawful acts which when they were committed were unlawful."⁽⁶⁰⁾

One might ask whether Acts which attempt to legalise unlawful acts
 can be within the competence of the legislature and whether their legality
 can be assailed in a court of law. So far as English law is concerned,
 according to both practice and principle, they are certainly legal and
 no court of law would pronounce them as illegal or unconstitutional.

(58) Ibid, at p.18.

(59) Ibid, at p.17.

(60) A. V. Dicey, The Law of the Constitution, Tenth ed., at p.233
 (1959).

Being enacted by Parliament, which can make or unmake any law, they exist as "the supreme instance of Parliamentary sovereignty." (61) The Indian constitution specifically states that, notwithstanding the constitutional ban on legislation infringing fundamental rights, Parliament may indemnify any person in respect of any act done in connection with maintenance or restoration of order in a martial law area and validate any penalty inflicted under martial law. (62)

(b) Distinction between an Act of Indemnity and the Proclamation of Martial Law

There is a distinction between an Act of Indemnity and the proclamation of martial law, the establishment of a state of siege, or any other proceeding "by which the executive government at its own will suspends the law of the land." (63) For, as has been asserted by Dicey, an Act of Indemnity, "though it is the legalisation of illegality, is itself a law." (64) An Act of Indemnity would certainly be an exercise of arbitrary sovereign power, except where the legal sovereign was a representative assembly, because, in such a case "even acts of State assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law." (65)

While the declaration of martial law is an executive act, an Act of Indemnity is a legislative measure following upon the aftermath of

(61) Ibid, at p.232.

(62) Art. 34, Indian Constitution.

(63) Ibid, at p.237.

(64) Ibid, at p.237.

(65) Ibid, at p.237.

the rebellion and rule by martial law. The fact that an Act of Indemnity legalises illegal acts may be advanced in support of the view that the exercise of martial law is illegal in itself. As ^{C.J.} *O. J. Cockburn* said: "These instances of the application of martial law were, therefore, either under statutory powers, with which no man has, judicially speaking, a right to quarrel, or when exercised by virtue of the prerogative of the Crown, were followed by Acts of Indemnity which, to say the least of it, sufficiently implies a doubt of the legality of the exercise of the power."⁽⁶⁶⁾ A different view of the nature of such Acts was, however, taken by Sir Frederick Pollock. He described an Act of Indemnity as "a measure of prudence and grace."⁽⁶⁷⁾ According to him, its purpose was not to justify unlawful acts ex post facto, "but to quiet doubts, to prevent vexatious and fruitless litigation, and quite possibly, to provide compensation for innocent persons in respect of damage inevitably caused by justifiable acts which would not have supported a legal claim."⁽⁶⁸⁾ Further, as some extraordinary measures were justifiable at common law in time of grave disturbance or war and "it has never been decided exactly how far the justification extends and there is in fact great difference of opinion, it is obviously proper for an Act of Indemnity to be framed in language of abundant caution."⁽⁶⁹⁾

(66) *R. v. Nelson and Brand*, Special Report, at p.56 (1867).

(67) Sir F. Pollock, What is Martial Law? 18 L.Q.R. at 157.

(68) *Ibid.*

(69) Sir F. Pollock, 19 L.Q.R. at p.231.

(c) The Desirability of Acts of Indemnity

Generally laws must be prospective and not retrospective but, as J. Willes⁽⁷⁰⁾ said, there may be circumstances when retrospective laws, such as Acts of Indemnity "cannot be pronounced naturally or necessarily unjust." He further said:

"There may be occasions and circumstances involving the safety of the State, or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society for want of provision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, summum jus summa injuria."⁽⁷¹⁾ The question whether the circumstances of the particular case would call for a special and exceptional remedy must, as it involves matters of policy and discretion, in each case be decided by Parliament "which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a Court of ordinary municipal law is not commissioned to inquire or adjudicate."⁽⁷²⁾

As to the desirability of having an Act of Indemnity passed for the protection of those who acted under some stress of urgency and necessity, Sir David Dundas expressed the following opinion before the Ceylon Committee:

"5480. The Governor of a colony, representing the Crown, can exercise the self-same power as the Crown itself, if the urgency and

(70) Phillips v. Eyre (1870) 6 Q.B.1. at p.27.

(71) Ibid, at p.27.

(72) Ibid, at p.27.

necessity of the case justify it? - I think so.

"5481. And I presume parties so acting would, in the event of their having to defend their conduct, have entirely to rely upon the necessity and urgency of the occasion which called for the proclamation of Martial Law? - I do not admit the word 'proclamation.' They would have to justify themselves by the law under which they acted being Martial Law. Whether the authorities who set it going had a right to do so, is another question.

"5482. Which question the Constitution provides a power of by settling an Act of Indemnity? - An Act of Indemnity is, of course, a prudent measure at all times. Whenever you overstep the law, I recommend you to obtain an Act of Indemnity, if you can get one; but I am not sure that an Act of Indemnity is necessary. I think it would be wise for a Governor who has proclaimed and executed Martial Law, to have the sanction of his Sovereign for his act, and it would be prudent for all persons who have acted under such a law to have an Act of Indemnity. It is a short answer to any person who asks you questions about your conduct during the time Martial Law existed." (73)

(d) The Aim and Purpose of an Act of Indemnity

The military authorities and the officers acting under a proclamation of martial law must not take it for granted that they can seek shelter

(73) Quoted by Clode in his Military Forces of the Crown, Vol. II, at pp.178-9 (1869).

under an Act of Indemnity, subsequently passed, for every unlawful act committed by them during the rebellion or disturbance. They must not suppose that Parliament will afterwards afford them statutory indemnity in all cases and as a matter of course. As ^{C.J.} C. J. Cockburn said:

"To my mind, the exercise of martial law cannot be put on a worse or more objectionable footing. No man ought to be placed in the position of being called upon knowingly and intentionally to violate the law, more especially where the lives of his fellow-subjects are concerned nor on any sound principle ought he to be protected if he does so. The only legitimate purpose of an Indemnity Act is to protect a man who, placed in trying circumstances and called upon to exercise a doubtful and ill-defined power, has gone, as is very likely to happen in such a case, in ignorance or haste, but not intentionally, beyond the limits of the law."⁽⁷⁴⁾

Whatever may be the scope of an Act of Indemnity, its chief aim and purpose is to limit the liability of the officers who took action to restore peace and order. During a state of rebellion, when martial law has been proclaimed, the court will stay its hands in restraining the military arm but, as has been said, "when an emergency is over, however, the courts tend to resume their normal strict interpretation of statutes in favour of the individual."⁽⁷⁵⁾ It follows, therefore, that, unless the

(74) R. v. Nelson and Brand, Special Report, at p.74.

(75) O. Hood Phillips, The Principles of English Law and the Constitution, at p.340 (1939).

defendant can justify his action as far as it is allowable by the subsequent Act of Indemnity, he will incur liability for the excesses beyond the scope of the Act. As General (afterwards Lord) Hutchinson remarked: "The principle of a Bill of indemnity he conceived to be an exception of certain cases, from the operation of the general law, and as such it became necessary for every person claiming the benefit of the indemnity to show that he came within the meaning of the exception." (76)

(77)
In Phillips v. Eyre, an action brought by the plaintiff for assault and false imprisonment in the island of Jamaica, Cockburn C. J. made some concession to the vehement argument of the plaintiff's counsel against the Acts of Indemnity which were passed after every insurrection. He said:

"There can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individuals who, innocent possibly of all offence, have been subjected to injury and outrage often of the most aggravated character." (78)

(76) His remarks during a debate in the Irish House of Commons on the petition of Mr. Fitzgerald praying indemnity for certain acts done by him in suppressing the Irish Rebellion of 1798, Wright v. Fitzgerald (1798) 27 St. Trials, at p.806.

(77) (1869) L.R.4 Q.B.225.

(78) Ibid, at p.242.

W. J. Cockburn^{C.J.} fully agreed that "such legislation may be used to cover acts of the most tyrannical, arbitrary, and merciless character - acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices or fears."⁽⁷⁹⁾ He, however, maintained that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity.

Martial Law undoubtedly gives immense powers in the hands of persons in authority during a grave and serious disturbance and the object of a retrospective Indemnity Act to protect them for any interference with the personal liberty or property of the subject which was reasonably necessary and done in good faith. Nevertheless, the fact that persons exercising such unlimited powers have to look to Parliament for approval of, and exemption from, all liability for their acts, shows the existence of the Rule of Law.

5. A Few Instances of Acts of Indemnity: Their Contents

In England an early instance of an Act of Indemnity is provided by one passed after Wat Tyler's Rebellion, entitled "The King's Pardon to those that repressed or took revenge of his rebels."⁽⁸⁰⁾ After reciting how the lords and gentlemen of the realm of England "made divers

(79) Ibid, at p.243.

(80) 5 Ric. 2.c.5. The first Act of Indemnity was passed as early as 1 Edw. 3.c.1.

punishments upon the said villains and other traitors without due process of the law, and otherwise than the laws and usages of the realm required, although they did it of no malice prepense, but only to appease and cease the apparent mischief," it enacted that "they shall never be impeached nor grieved in body, goods, nor their heritages and possessions, by any way by Our Sovereign Lord the King, his heirs or ministers, nor none other in time to come, but utterly shall be thereof quit for ever by this grant⁽⁸¹⁾ and statute without having thereof other special charter or pardon."

Of the many Acts passed by the United Kingdom Parliament, it is only proposed to refer to one and, before doing so, the circumstances under which it was passed must be explained. In England, during the two⁽⁸²⁾ World Wars, martial law was not declared, but Parliament invested the executive with wide statutory powers to deal at discretion with a person's property or liberty, if the conduct and prosecution of the war demanded such interference. We shall in due course examine some of the provisions of these Acts, but here it will be sufficient to say that these enactments, especially the Emergency Powers (Defence) Act, 1939, excluded any form of judicial review of the acts of the executive.

But as the possibility of the executive exceeding the statutory powers so granted could not be excluded, an Indemnity Act was passed in

(81) Ibid.

(82) According to Professor Hood Phillips England was put under martial law during the First World War. The Constitutional Law of Great Britain and the Commonwealth, Fifth ed., at p.550 (1957).

1920 which relieved servants of the Crown from being sued for damages for illegal acts committed by them. For acts done in good faith and in the public interest, Section I (1) of the Indemnity Act, 1920, provided as follows:

"No action or other legal proceedings whatsoever whether civil or criminal shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done, whether within or without His Majesty's dominions, during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or for the enforcement of discipline, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown in any capacity, whether naval, military, air force or civil, or by any other person acting under the authority of a person so holding office or so employed; and if any such proceeding has been instituted whether before or after the passing of this Act, it shall be discharged and made void."

It is necessary to remember the distinction between acts done in good faith and acts actually necessary to suppress rebellion or repel invasion. Thus, when, on the passing of an Act of Indemnity in 1836 by the Legislative Council of the Cape of Good Hope, it was submitted to
(83)
the Colonial Office for confirmation, certain amendments were suggested

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- (83) The provisions of the Act were as follows: "The said Governor, and also all persons acting under his order, direction, and authority, shall be, and they are jointly and severally hereby indemnified, freed, and discharged from and against all actions, suits, prosecutions, and penalties whatsoever, for or on account or in respect of all or any acts, matters, and things whatsoever done, ordered, directed or authorised by the said Governor, or by any person or

by Lord Glenelg. According to him the concluding words of the Act did not properly express the meaning intended by the local Legislature. He said: "Those words indemnify all persons for all acts done by them bona fide, in furtherance or in execution of the objects for which Martial Law was proclaimed; but many acts of wanton and unnecessary rigour, or even of injustice and cruelty, may possibly have been done bona fide, in furtherance of those objects." (84) He, therefore, suggested that the appropriate phrase was "all acts necessarily or properly done."

If we regard the sanctity of the fundamental rights of the citizens, the above proposition lays down a sound principle. Otherwise, there would be no limit to the extent of the repressive measures of the military to which they count on being indemnified. The acts must be reasonably necessary and proper for the purpose of the suppression of the rebellion. This aspect of the matter was stressed in a despatch of 19th June, 1866, whose object was to exonerate the Governor of Jamaica

persons acting under his order, direction, and authority, and within the said places or any of them, during the existence therein of such Martial Law as aforesaid: So only, and provided, that such acts, matters, and things shall have been done, ordered, directed, or authorised bona fide, in furtherance and in the execution of the objects for which Martial Law was proclaimed as aforesaid." Clode, Military Forces of the Crown, Vol. II, at p.504 (1869). Lord Glenelg was not satisfied of the propriety of enacting such an Act in favour of the Governor himself, as this would necessarily imply that His Majesty's representative was amenable to the civil and military tribunals of the Colony.

(84) Clode, Military Forces of the Crown, Vol. II, at 505 (1869).

and all other officers for any act done reasonably and in good faith.

After the rebellion there in 1865 was suppressed a local Act of Indemnity
(85)
was passed. However, the despatch proceeded as follows:

"Her Majesty's Government have been advised by the Law Officers of the Crown that the effect of the Indemnity Act will not be to cover acts done either by the Governor or by subordinate officers, unless they are such as (in the case of the Governor) he may have reasonably and in good faith considered to be proper for the purpose of putting an end to the insurrection, or such as (in the case of subordinates) have been done under and in such conformity with the orders of superior authority or (if done without such orders) have been done in good faith and under a belief, reasonably entertained, that they were proper for the suppression of the insurrection, and for the preservation of the public peace in the island." (86)

(85) Some of the provisions of the Act relevant for our purpose were:
"That all personal actions, indictments, and proceedings present or future, whatsoever, against such authorities, or officers, civil, military or naval, or other persons acting ... for or by reason of any matter or thing commanded, ordered, directed, or done since the promulgation of Martial Law aforesaid, whether done in any district in which Martial Law was proclaimed, or in any district in which Martial Law was not proclaimed, in furtherance of Martial Law ... and during the continuance of such martial law, in order to suppress the said insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void; and that every person by whom such act, matter, or thing, shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid ... shall be freed, acquitted, discharged and indemnified as well against the Queen's most Gracious Majesty, her heirs and successors etc.

"That his Excellency Edward John Eyre, Esq. ... and all officers and other persons who have acted under his authority, or have acted bona fide for the purposes and during the time aforesaid, whether such acts were done in any district in which Martial Law was proclaimed, or in any district in which Martial Law was not proclaimed, are hereby indemnified in respect of all acts, matters and things done in order to put an end to the said rebellion; and all such acts so done are hereby made and declared to be lawful and are confirmed." Clode, Military Forces of the Crown, Vol. II, at p.494 (1869). (86)Ibid, at p.496.

CHAPTER 6THE SCOPE OF JUDICIAL CONTROL1. Judicial Sanction behind the Use of Force

It is assumed that peace and order are normal features of a well-governed State, but occasionally situations may develop when normal conditions no longer exist. Those to whom the preservation of the peace is of the highest consequence are confronted with 'a special and extreme aspect of administrative action.' What can they do? Short of abdicating the role assigned to them, they can resort to the only alternative still remaining open to them, to repel force by force. Our object will be to record judicial opinions as to when and how much force can legally be applied when there is such extraordinary commotion as to render every attempt to maintain peace a failure and the civil authority powerless. Besides "proclamation of martial law" with which Commonwealth lawyers are acquainted in this context, there is another expression, "declaration of a state of war," very much used in America, both meaning much the same thing. Irish judges have also used the latter expression. To avoid confusion, it will be useful to
(1)
treat them as synonyms. On the existence of the condition of affairs

(1) In the words of Mr. Stuart Wortley in the House of Commons Committee on the Ceylon revolt in 1849 "the proclamation of martial law is the declaration of a state of war." - G. G. Phillimore, Martial Law in Rebellion, J.S.C.L., April 1900, at p.129.

which require recourse to the military forces of the State, the practice in the Commonwealth has been to proclaim martial law in the affected area but in America it has not been uniform. Confronted with such a necessity, the government has sometimes declared "a state of war" and on other occasions proclaimed martial law, the effect being the same.

The popular inference, based no doubt on past experience, that any extraordinary regime must be preceded by a declaration of martial law or a state of war has no legal support, though "the intention to exercise such exceptional power and to take such exceptional measures (2) is generally announced by a 'proclamation of martial law.'" When the government has to suppress a rebellion or repel a foreign invasion, it is quite immaterial whether martial law or a state of war has been declared. "The right to administer force against force in actual war does not depend upon the proclamation of martial law. It depends upon the question whether there is war or not. If there is war, there is (3) the right to repel force by force." The right in law to resort to force arises from the existence of conditions of war or similar conditions. The assumption of arbitrary powers and their application in cases of necessity do not derive sanction from a proclamation of

(2) British Manual of Military Law (1956) Part I, Section 1, at p.6.
 (3) Per Lord Halsbury in Tilonko v. Attorney-General of Natal (1907) (1907) A.C. 93 at p.94.

martial law. "The notion that martial law exists by reason of the proclamation - an expression which the learned Counsel has more than once used - is an entire delusion."⁽⁴⁾ It must not also be supposed that such proclamation confers any new powers on the authorities which they did not possess before. "The proclamation in no way adds to the powers inherent in the government of using force to suppress disorder."⁽⁵⁾

The proclamation of martial law is merely an indication of the mind of the executive and the views they have taken of certain occurrences and condition of affairs prevailing in the part or whole of the country.

As Sir Frederick Pollock said: "Proclamation of martial law does show that the responsible executive officers of the king thought a state of war existed, and may be strong evidence, though subject to be rebutted, that a state of war did exist."⁽⁶⁾ It only serves as a notice to the inhabitants of the disturbed area that some extraordinary measures are to be enforced in relation to certain activities.⁽⁷⁾ The proclamation does not create the fact of war in the locality or the country. "The proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact."⁽⁸⁾

(4) Ibid.

(5) Sir William Holdsworth, Martial Law Historically Considered (1902) 18 Law Quar. Rev. at p.129.

(6) Sir Frederick Pollock, What is Martial Law? (1902) 18 L.Q.R. at p.153.

(7) Joint Opinion of the Attorney and Solicitor Generals Sir John Campbell and Sir R. M. Rolfe on the power of the Governor of the Lower Canada to proclaim martial law (1838).

(8) Caleb Cushing, Attorney-General of the U.S.A., VIII Opinions of the Attorney-Generals at p.374 (1857).

That the right to recourse to the military forces arises from
 (9)
 necessity has been admitted on all hands, but what kind of necessity invests the military authority with such unregulated discretion has often been the subject of inquiry before the courts. The review of cases will show that the "hands-off" order to the judiciary, whether it is express or implied, will only be justified by overriding necessity, a pressing and imminent danger, which threatens the very existence of lawful authority. If this is not so, martial law cannot be applied. "It is the emergency that ~~gives~~ ~~the~~ gives the right, and the emergency
 (10)
 must be shown before the taking can be justified." It is true that every case must be determined according to its own circumstances, but in order that the armed forces can exercise any extraordinary powers not granted them by the constitution and the ordinary law "the danger must be present or impending, and the necessity such as does not admit
 (11)
 of delay."

Mere subjective apprehensions as to the existence of such necessity would not, however, justify the exercise of arbitrary powers. It will subsequently be judged with reference to an objective standard, for "necessity is an objective standard by which executive action can
 (12)
 be measured." To determine its presence the court will take into

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- (9) Joint Opinion of the Attorney and Solicitor Generals Sir John Campbell and Sir R. M. Rolfe. "The right of resorting to such an extremity is a right arising from a limited by necessity of the case - quod necessitas cogit, defendit." Ibid.
 (10) Mitchell v. Harmony, 13(Wall)(U.S.)115 at 134 (1851).
 (11) Ibid.
 (12) Bernard Schwartz, Law and the Executive in Britain, 1949, at p.343.

consideration the state of facts as they were at the time of taking the action. There must be a reasonable relation between the steps taken and the emergency. (13) If such relationship does not exist, the action will be wholly arbitrary, and could be restrained. (14)

Can the court restrain the Executive from declaring martial law when such necessity would seem to be apparently non-existent? In Luther v. Borden, Chief Justice Taney of the United States Supreme Court said that the Court would not intervene as to the question whether "the public safety" required a declaration of martial law, such question being political in nature. (15) Until the emergency is declared over the Court will not even hold that the disorders did not amount to rebellion so as to justify the suspension of ordinary laws. (16)

Though both judges and jurists have conceded full powers to the armed forces engaged in suppressing a rebellion or repelling an invasion, they have also recognised that any use of force is limited as well as justified by the nature of the emergency. Accordingly, the armed forces whose duty is merely to restore order or repel an enemy cannot act wantonly. The common belief that a declaration of martial law has a transcending quality has to be discounted. (17) "The idea seems to be growing

(13) Ibid.

(14) Sterling v. Constantine, 287 U.S. 378 (1932).

(15) 5 How. 1 (1849).

(16) Ibid.

(17) Ballantine, Unconstitutional Claims of the Military Authority (1915) 24 Yale Law Journal 189.

that it is the prerogative and function of the military to substitute itself for all civil authority, and that, while it is in control, the constitutions, courts and laws may be suspended and set aside." (18) It must be understood by all concerned whose aim is the public welfare that "martial law, while it dispenses with the forms and delays which appertain to ordinary criminal jurisdiction, does not, therefore, authorise or sanction every deed assumed to be done in its name. It stops far short of that." (19) The exercise of powers when martial law has been proclaimed does not enable members of the armed forces to commit excesses under colour and pretence of authority. Though martial law allows every act necessary for maintenance and restoration of order, at the same time it requires that it must be honest and bona fide. On his failure to prove executive good faith in administering martial law, Governor Wall was not only prosecuted but was hanged for the crime of committing murder. The legislature, however, usually passes an Act of Indemnity which provides a good defence to those responsible for acts done in good faith. This kind of legislation, as already seen, does not cover any act motivated by malice or ill-will. In the absence, however, of an Act of Indemnity, persons guilty of violating civil rights may be civilly and criminally liable. "Excess and wantonness, cruelty and unscrupulous contempt of human life, meet with no sanction

(18) Finlason, Repression of Riot and Rebellion, at p.168.

(19) Ibid.

from martial law any more than from ordinary law." (20) If it is argued that every act, however unnecessary or malicious it may be, is justified by a proclamation of martial law, one may easily foresee the institution of martial law degenerate into an engine of tyranny, private malice and revenge. (21)

(22)
In a case arising in South Africa which involved a consideration of the extent of military authority, J. Bristowe stated the position of the courts if the armed forces use the emergency or the declaration of martial law as a cloak for acts of private vengeance, personal enrichment or wanton or capricious oppression thus:- " ... in such a case as this, if it arose, so long as the military power is not used to close the Courts and to drive the Judges from their seats, they must exercise their constitutional authority." (23) J. Mason concurred with this opinion when he said that "Courts of Justice so long as they are not closed by force, would be bound to entertain a prayer for protection against patent violations of right and justice of this nature." (24)

Accordingly, it may be assumed that if the plaintiff can establish that the powers were not used bona fide and for recognised purposes, he will be entitled to damages, at least when martial law has

(20) Per Colonial Judge in a case arising after Jamaica Insurrection in 1865, quoted by Finlason. Ibid.

(21) Ibid.

(22) Dedlow v. Minister of Defence, 1915 T.P.D. 543.

(23) Ibid, at 562.

(24) Ibid, at 557-558.

(25)
 been withdrawn. The injured person's immediate right of action would only be suspended because the law gives him an ultimate right to redress in such cases. "If no such ultimate right exists, the existence of actual war would convert the military authorities into absolute and irresponsible despots, because no immediate relief could be given if there were no legal liability which would support the ultimate right to redress."
 (26)

It is needless to say that, as martial law is applied in different circumstances, the degree of force admissible must also vary with them.
 (27)
 On less dangerous occasions the armed forces should not only use the sledge-hammer of martial law with due moderation, but should so long as they are not dealing with open resistance, operate as far as possible through the civil power.
 (28)

(25) Wright v. Fitzgerald (1799).

(26) 1915 T.P.D. at 557.

(27) "It may operate to the total suppression or overthrow of the civil authority, or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels."

Bishop's Criminal Law, quoted by J. Solomon in Regina v. Naude (1901) 10 Cape Times Report at p.488.

(28) "When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding." Supra, note. 9.

2. Circumstances Justifying the Use of Force: Existence of "State of War"

As already seen, the government's right to use force against force
(29)
"depends upon the question whether there is war or not." It therefore becomes necessary to consider what a "state of war" is and when it arises.

A state of war when it exists as a domestic fact generally implies the presence of warring groups or of overt hostilities either between two groups of citizens or between a group of individuals and the lawful government, and is to be distinguished from a state of war as a fact in International Law.

In considering the extent of powers assumed by the authority on a declaration of martial law, both judges and lawyers have used the expression "a state of war" in its sense in Municipal Law, meaning any formidable disturbance which required the intervention of the armed forces.

A state of war as a domestic fact may be created as much by invasion by an external power as by rebellion or insurrection from within the country. Though the conditions arising from any of them may be in some respects similar, yet differences exist between insur-
(30)
rection or rebellion and war in the international sense. For the exercise of powers under martial law it is necessary to bear in mind the distinction between them.

(29) Tilonko v. Attorney-General (1907) A.C. 93 at p.94.

(30) "War is a contention between two or more states through their armed forces." Oppenheim's International Law (1951) Vol. II, p.202.

(31)

In an American case an insurrection has been defined as consisting of the open and active opposition of a group of individuals to the execution of the laws; it must be of formidable character and must defy, though temporarily, the authority of the government. It need not be accompanied by bloodshed. Again, in drawing the distinction between war and insurrection, Justice Sanner of the Supreme Court of Montana said:

"War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending States; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency which to mere insurrection are unknown."⁽³²⁾

Confusion must again be avoided so that the expression a "state of war" has not to be used as a synonym for "war." For the presence of war, as understood in International Law, makes the exercise of war powers under the constitution an obvious necessity. Whereas a state of war created by insurrection or rebellion has never been considered as such an emergency as to confer on the executive such supreme powers, though in some cases of martial rule similar powers have virtually been exercised as, for example, in the American Civil War.

(31) In re Charge to Grand Jury (1894) 62 Fed. 828.

(32) Ex parte Macdonald (1914) 49 Montana 454.

(33)
 In an Irish case E. J. O'Connor^{L.J.}, in refuting the argument that the Irish Rebellion of 1921-22 did not amount to war, expressed the opinion that it was undoubtedly war. "I suppose there are many people who would say it was not - hesitating to dignify by the title 'war' a state of circumstances in which there is little or no open clash of arms, and in which the attempt to coerce the will of others is carried on, not in the field, not in battle, but mainly, at any rate, in a surreptitious way by the commission of multiplied crimes. But we have to consider the question from its legal aspects; and from that point of view it is undoubtedly war - guerrilla war, a sort of war perhaps,
 (34)
 but war."

What are the conditions obtaining during a state of war will be evident from the following passage:

"On the other hand we have a body of persons, small, no doubt, but making up in recklessness what they lack in numbers, determined by any and every method in their power to bring this country to a state of anarchy rather than submit to the will of the lawfully constituted and freely chosen Government of the country. These men are equipped with revolvers, rifles and machine guns, and have the necessary implements, material, and skill for the manufacture of high explosives; they have no uniform. They are unevently distributed over Ireland; they are

(33) Johnstone v. O'Sullivan (1923) 2 I.R. 13.

(34) Ibid, at p.14.

here today, and away tomorrow; now and again they concentrate in certain localities in such force as temporarily to dominate the situation but flee to the woods and hills upon the approach of the organised Government troops; mostly they carry on their operations as a sort of invisible army, posing as harmless citizens by day, and only venturing from their lurking places by night to work destruction and take life. They stop at nothing in their design; they attack the Government troops with bombs or gun fire; they shoot the unarmed civil police; they attack and destroy by mine, fire or otherwise property both public and private; they explode roads, bridges, railway stations, signal cabins; they set trains at full speed along railways; here in our capital city the lives of nervous people are made intolerable by the din of their nightly performances; they inflict immeasurable loss and injury upon a peaceable community, in the supposed interest, be it observed, of that community." (35)

Where actual rebellion is raging some such conditions or worse than them may come to happen, but even on occasions less dangerous than rebellion or insurrection, martial law has been proclaimed and applied. In some of the American States, a declaration of a state of war has been made in normal peacetime, just to overcome some constitutional difficulty in getting things done. These instances are no doubt

(35) Ibid, at p.24.

abuses of the power to declare martial law, and as we have seen, the courts did not lose, at least in some cases, the opportunity to call (36) such action illegal and unconstitutional. So far as the practice in the Commonwealth goes, it is generally in times of violence or threatened violence that martial law has been declared. It may be questioned whether on all such occasions a declaration of martial law was really necessary, but in fairness to the governments concerned it may be said that circumstances were such that mere police precautions would prove inadequate. To govern colonial peoples was, however, not an easy task. What would suffice in a country like England in a similar situation were considered insignificant by the government amidst a hostile population. Moreover, there would always remain the chance of wrong assessment of the actual situation, which, if it did not amount to a state of war, was still so considered.

3. Test to Determine the Existence of War: the "Open Court" Theory

Use of excessive force can never be justified except by statute yet, when martial law is declared, challenges are often made in a court of law against the application of force by the military authority. It has been consistently held that the court will not intervene with

(36) Chapter 4.

(37)
military action, if war exists and so long as it exists. Before so deciding, it therefore becomes necessary to determine whether a state of war existed when force was used. What, then, is the test to determine whether a state of war exists?

Though English jurists have speculated on the circumstances in which the armed forces would be justified in exercising all necessary powers to put an end to a state of war, English history does not provide us with any instance of the normal exercise of this power, the ordinary administration of justice being suspended by reason of civil war. (38)
Yet before 1629 occasions arose when Commissions were issued under the Great Seal "to proceed within the land, according to the justice of Martial Law, against such soldiers and marines, or other dissolute persons joining with them, as should commit any murder, robberies, felony, mutiny or other outrage or misdemeanour whatsoever." This was recited in and condemned by the Petition of Right.

Be that as it may, in England both judges and legislators have generally tried to apply some objective test to determine whether a state of war exists in order to pronounce upon the legality of the acts of the military forces. At the time of the Petition of Right the Members of Parliament were less concerned with the Crown's power

(37) Ex parte Marais (1902) A.C. 109.

(38) Thus J. Cockburn said: "It certainly was not, according to Coke, in the wars of Henry III, or during the wars of the Roses, or during the Great Civil War." R. v. Nelson and Brand (1867) Special Report at p.70.

to apply martial law than with the objects for and the occasions on which it could be declared. (39) Thus, the discussion that ensued on the just occasions when martial law could be enforced gave rise to what later on became known as the "open court" theory.

Thus, during the debate on the Petition of Right Mr. Rolle said: "In this disputation I will not trench on Power, but the abuse of it. The Law of the Marshall is the King's law, and the common law takes notice of it; we acknowledge it so to be, but now the question is, (40) when it is to be used."

He then proceeded to say that "martial law is merely for necessity, where the common law cannot take place." As the necessity cannot arise in peace time but only in time of war, it is essential that both should be considered and defined. He said:

"If the Chancery and Courts of Westminster be shut up that are officina justitiae, it is time of war but, if the courts be open, it is otherwise; yet if war be in any part of the kingdom, that the sheriff cannot execute the king's writ, there is tempus belli." (41)

He considered that martial law could only be executed where common law could not be enforced owing to the presence of the enemy in any part of the kingdom. He said, however, that if a subject was taken but not slain in the battle field during the time of rebellion, it is not the military but the common law under which he should be (42) tried.

(39) Clode, Military Forces of the Crown (1869) Vol.II, p.157.

(40) Ibid.

(41) Ibid.

(42) Ibid.

Similarly, it seems that Coke detested the idea of the existence of concurrent jurisdiction of the martial and the ordinary law of the land. He thus said:

"But God send me never to live under the law of conveniency or discretion. Shall the soldier and justice sit on one bench? The trumpet will not let the crier speak in Westminster Hall. Non bene
(43)
conveniunt."

In his opinion the time of peace was when the courts were open. The reasons were, he said, "for when they are open, then you may have a commission of oyer and terminer; and where the common law can determine
(44)
a thing, the Martial law ought not."

Comparatively recently, in 1838, in their joint opinion on the power of the Governor of the Lower Canada to proclaim martial law during

(43) Ibid at p.158. Also in his Commentary on Littleton, Coke elaborated the same idea when he said: "When the courts of justice lie open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, et silent leges inter arma, then it is said to be time of war." Co. Litt. 249 b.

Hale was expressing the same opinion by saying that "the exercise of martial law, whereby any person shall lose his life, or members, or liberty, may not be permitted in time of peace when the King's courts are open."

Blackstone referred to the fact of the existence of civil war as "when the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open." 2 Comm. at 667.

(44) Ibid.

(45)
 rebellion, Sir John Campbell and Sir R. M. Rolfe, the Attorney and Solicitor Generals, said that the right to do so arises from the necessity of the case. But in so far as they could see "when the regular courts are open so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding."⁽⁴⁶⁾

It is often the experience that the courts are sitting and their doors are open, that is to say, in a physical sense, but for all practical purposes they are unable to enforce their judgments. Would it still be argued that a state of war was not prevailing as the courts remained open? Is it necessary that judges be actually pulled from their seats; or does it suffice that the public disorder renders the administration of justice precarious, fitful, uncertain, thus defeating the purpose for which courts are organised? We shall consider the answers to these questions in discussing the relevancy of the "open court" theory in determining today whether a state of war exists in a particular area.

Reference to American law on this point would show that in defining when a state of war prevails the judges' minds were coloured by what had already been said about it in England.⁽⁴⁷⁾ Thus, in 1866 in

(45) It may be recalled that proclamation of martial law is equivalent to a declaration of a state of war.

(46) Quoted by William Forsyth in Opinions and Cases on the Constitutional Laws (1809) at p.198.

(47) "What Justice Davies said in the Milligan opinion was a page torn from the constitutional history of England." Charles Fairman, The Law of Martial Rule (1942) 55 H.L.R. at p.1254.

(48)

the famous decision of Ex parte Milligan Justice Davies of the United States Supreme Court said that the proper occasions for the application of martial law would arise "if in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law then, on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course." But, quite emphatically, he denied the possibility of applying martial law when the courts are normally functioning: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."⁽⁴⁹⁾

Applying the test enunciated or reaffirmed by him, Justice Davies held that the laws of war "can never be applied to citizens in States which have upheld the authority of the Government, and where the courts are open and their process unobstructed." So far as Indiana, where Milligan was tried by a military tribunal, was concerned, he said:

"This Court has judicial knowledge that in Indiana the Federal authority was always unopposed and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service."⁽⁵⁰⁾

(48) (1866) 4 Wall 2.

(49) Ibid.

(50) Ibid.

4. Criticism of the Milligan Test

Objections to acceptance of the test laid down by Justice Davies were raised by the minority in the Milligan case itself. They pointed out in clearest language that it might happen that courts, though open and undisturbed in the discharge of their functions, were in fact unable to avert threatened danger, or to punish with adequate promptitude guilty conspirators. When the administration of justice becomes a delusion and a reproach, it matters little, so far as the ends of government are concerned, that the judges had been driven off by physical force or their efforts paralysed by widespread disaffection (51) to the laws. In reviewing the Milligan case, Professor Willoughby said that in so far as the majority was of the opinion that the necessity justifying martial law could not be created by a mere legislative fiat, they were not wrong. But their declaration that martial law could not arise from a threatened invasion and the fact that the courts were open would be a conclusive test in deciding the necessity of martial law, went a little too far. He said:

"The better doctrine is not for the courts to attempt to determine in advance with respect to any one element what does, what does not create a necessity for martial law but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances." (52)

(51) Birkhimer, Military Government and Martial Law, at p.455.

(52) Willoughby, The Constitutional Laws of the United States (1910) Vol. II, at p.1251.

How far the Milligan test is, in the light of later developments in the technique of warfare, acceptable as offering a reliable criterion to determine the necessity for the application of martial law, has recently been considered in a few American cases. Times have changed and the resultant contrast is also great. "In the Civil War, when Milligan was tried by military commission, no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. They then never imagined the possibility of flying lethal engines hurtling through the air several hundred miles within an hour. They never visioned the possibility of far distant forces dispatching an air armada that would rain destroying parachutists from the sky and capture far distant territory overnight."⁽⁵³⁾

The inadequacy of the "open court" theory advocated in the Milligan case was pointed out in Korematsu v. U.S.⁽⁵⁴⁾ The reasoning of the Milligan case which implicitly contained the hypothesis that "in the absence of actual invasion, the slower and more deliberate procedures of the civil courts are a sufficient protection from disloyal citizens lending aid to the enemy" is only proof of the background from which it issued, "the possibility of air invasion covering the state of Indiana in less than two hours was not even 'lurking' in the minds of the Justices."

(53) Ex Parte Ventura (1942) 44 F. Supp. 520 at 522.

(54) 140 F.(2d) 289.

The Court, however, recognised that if, in view of modern technical developments in warfare, the actual theatre of war must be supposed to embrace the whole country, the Milligan test would still be applicable. "Since necessity creates the rule (martial), it is not inconsistent with the principle established in the Milligan case that a threatened air invasion, directed by saboteur signals, which in an hour's time could destroy every federal court-house in California, presents the necessity for the substitute of military action against such sabotage for that of civil courts."⁽⁵⁵⁾

Too literal an application of the test should thus be avoided. This is possible only if the concept of the locality of actual war is expanded. Commenting quite recently on the Milligan case, an American writer found it difficult to see why the "open court" rule should be criticised or declared incompatible with total war. "It is true," he said, "that modern war is technologically different from the earlier wars ... The question under the Milligan case is whether the courts are open, not whether the enemy's speediest method of transportation is an airplane or a horse. The open court rule is no mere mechanical test,⁽⁵⁶⁾ nor was it intended to be."

Apart from the arguments based on the needs of a total war, some other cogent reasons have been advanced in favour of entrusting the military authority with the administration of law and justice without

(55) Ibid, at p.296.

(56) John P. Frank, Martial Law in Hawaii (1944) 44 Col. L. Rev. 639.

any interference by the civil courts, which may remain open. One of such reasons is, according to the opinion of the minority in the Milligan case, that "in times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels and courts their most efficient allies." This is certainly a strange remark, but it must not be forgotten that the case was heard immediately after the American Civil War and that the majority did not subscribe to it. Judges are but human, and share the feelings of other people, but, unless a state of civil war prevails, it is unlikely that they will sympathise with those who are responsible for violation of law and order. This is not intended to imply that, during a civil war, judges would invariably be infused with any partisan spirit, but the circumstances of the American Civil War were such that this result was not unlikely, so that the mere fact that the courts remained open would not of itself be sufficient to indicate that a proclamation of martial law was uncalled for.

Some other suggestions, such as lack of manpower necessary to permit a jury to function, requirement of greater secrecy than is possible in a trial before a civil court and attempt by a jury perversely to acquit the guilty and impossibility of changing the venue, have also been urged. But, it is submitted, the main reasons why the military courts should administer law and order are that they are the best judges of how men involved in breaches of martial law regulations, which

are not recognised as law by the ordinary courts, should be dealt
(57)
with.

As a matter of fact all these arguments were advanced in a
(58)
recent American case and it was contended that however adequate the
"open court" theory might have been in 1628 and 1864 it was definitely
unsuited to modern warfare conditions where the whole country would be
involved in all sorts of attack through the courts were operation.
J. Black^J, in delivering the opinion of the Court, expressed his
unwillingness to accept the contention that a military commander, on
the basis of his conception of war necessity, could require all civilians
accused of crime to be tried summarily by military tribunals, on the
plain ground that such trials were unnecessary so long as the civil
courts were fully able to perform their functions. He said:

"The argument thus advanced is as untenable today as it was when
cast in the language of the Plantagenets, the Tudors and the Stuarts.
It is a rank appeal to abandon the fate of all our liberties to the
reasonableness of the judgment of those who are trained primarily for
war. It seeks to justify military usurpation of civilian authority to
punish crime without regard to the potency of the Bill of Rights."
(59)

Accordingly, it could justly be said that the rejection of the
sound Milligan rule would open the door to "rampant militarism" and it

(57) H. Erle Richards, Martial Law (1902) 18 L.Quar.R. 133.

(58) Duncan v. Kahanamoku & White v. Steeer (1945) 327 U.S. 314.

(59) Ibid, at p.329.

is the duty of the Court to guard "against an excessive use of any power military or otherwise, that results in the needless destruction of our rights and liberties."⁽⁶⁰⁾

Of course, it must be admitted that it is difficult to strike a balance between the conflicting interests - one which demands every military precaution against possible rebel or enemy action and consequently to a resort to necessary military measures, and the other which would prefer to safeguard the fundamental rights as long as practicable, that is to say, until the courts were closed.

The doctrine that a state of war is demonstrated by the closure of courts has been renounced in some cases in British dominions outside England and the prevalent judicial opinion in the Commonwealth is not in favour of unqualified acceptance of the "Open Court" theory.⁽⁶¹⁾

⁽⁶²⁾
Elphinstone v. Bedreechand, a case arising in Bombay where the East India Company was gradually extending its territorial frontiers is an early instance indicating the judicial mood.

The facts involved in this case were as follows: On 16 November, 1817, after the battle of Kirkee, the British forces occupied Poona,

(6) Ibid, at p.334.

(61) "The test of the modern British cases is more elastic. The fact that the ordinary courts are in operation is not, of itself, conclusive in determining the legality of martial law action: it is merely one of the factors to be considered in determining whether there was in fact an emergency justifying such action." Bernard Schwartz, Law and the Executive in Britain, at p.310.

(62) 1 Knapp 316: 12 English Reports (1830).

Peshwa Baji Rao's capital. On 15 December of the same year the Governor-General of India appointed the appellant Elphinstone the sole Commissioner for the settlement of the conquered territory and conferred on him authority over the entire civil and military administration. Elphinstone appointed the other appellant Captain Robertson the provisional Collector and Magistrate of the city of Poona. Suspecting that Narroba, the Peshwa's treasurer, possessed large quantities of treasure belonging to the Peshwa, Captain Robertson after the capitulation of the fortress at Raighur, caused Narroba's property to be searched and seized a few boxes of gold coins and jewels. On Narroba's death, his executor Bedreechand brought this action in the Supreme Court at Bombay for recovery of damages for the above seizure. The Supreme Court dismissed the action as against the East India Company but gave judgment and verdict against the appellant.

On an appeal against the decision of the Bombay Supreme Court, lengthy arguments were advanced before the Judicial Committee of the Privy Council as to the extent of the power of the military authority to interfere with person and property as long as the state of war existed and whether actually such condition existed at the time of the seizure. On behalf of the respondent it was vehemently contended that, when the appellant seized Narroba's treasure, the courts at Poona were open and normally functioning. It therefore followed that a state of peace and not war prevailed there, especially when there was no actual conflict at the relevant time.

The appellant conceded that though commissioners were appointed to preserve order and tranquillity and the ordinary courts were allowed to administer justice, the military character of the government of the conquered territory was thereby not lost. For this reason and the proper administration of the occupied territory, the military authority had power to arrest any person and seize any property. The courts of justice must in such cases be denied jurisdiction to entertain any suit against them.

The Judicial Committee of the Privy Council held that, under the circumstances in which the seizure was made, it must be regarded as a hostile seizure and that a Municipal Court had no jurisdiction. In delivering a very short judgment, Lord Tenterden said:

"We think the proper character of the transaction was that of hostile seizure made, if not flagrante, yet nondum cessante bello, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject: that if anything was done amiss, recourse could only be had to the Government for redress."⁽⁶³⁾

The fact that the courts were under the authority of the Provisional Government administering justice did not alter the nature of the transaction. Accordingly, their Lordships recommended His Majesty to reverse the judgment of the Court below.

(63) Ibid, at p.361.

(64)

In Ex parte Marais, Lord Halsbury cited and reaffirmed the principle laid down in Elphinstone's case by saying that "where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities." The petitioner had asked for leave to appeal against a decision of J. Buchanan of the Supreme Court of Cape Colony, stating that he was arrested under the order of the military authority without warrant in violation of the fundamental liberties of the subject and was shown no cause of such arrest. J. Buchanan's refusal to release the petitioner was based on the ground that the Court would not go into the necessity of the Martial Law Proclamation then in force.

The appellant urged that as there was no disturbance in the district in which he was arrested and the civil courts were exercising uninterrupted jurisdiction, the existence of a state of war could not be presumed. The Crown had, therefore, no power to try an offender under martial law. Even if a state of war existed, the application of martial law was limited by the necessity of preserving peace and order and the jurisdiction of the civil courts were not ousted. The petitioner was, therefore, entitled to be tried by a civil tribunal.

In refusing leave to appeal, Lord K. J. Halsbury^{l.c.} said:

"The only ground susceptible of argument urged by the learned counsel was that, whereas some of the courts were open, it was impossible to

apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but, where acts of war are in question, the military tribunals alone are competent to deal with such questions.

"They are of opinion that, where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

"Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging.

"The truth is that no doubt has ever existed that, where war actually prevails, the ordinary courts have no jurisdiction over the military authorities' action.

"Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

"It may often be a question whether a mere riot, or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil courts have no jurisdiction to call in

question the propriety of military authorities." (65)

5. Is the Marais Rule a Correct Approach?

What the Marais case decides is (i) that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals; (ii) that the fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging.

We shall consider the second rule first. Quite obviously it rejects the much advocated "open court" theory. In the words of Cyril Dodd, the Marais case "distinctly puts an end to the ancient rule that, because for some purposes the courts are open at a place, that place must be held to be one where peace exists, no matter what the actual fact may be." Similarly Erle Richards has said: "The necessity for taking action which infringes on rights of property or liberty cannot depend on the fact that the courts continue or do not continue to sit: it depends on the necessity created by the presence of an enemy in the country." (66) Pollock said that the prevalent opinion in the seventeenth century that it was time of peace when and where the courts were open and the King's writ could be executed might have laid down a fair test

(65) Ibid, at pp.114-115.

(66) Cyril Dodd, The Case of Marais, 18 L.Q.R.143 at 147 (1902).

(67) H. Erle Richards, Martial Law, 18 L.Q.R.133 at 141 (1902).

for themselves. "The presence of the King's enemies at York might well seem no cause whatever for holding that there was a state of war at Plymouth or even at Westminster."⁽⁶⁸⁾

Further, according to him, the consideration whether a state of war exists must not be based on piecemeal facts but on the total presence or absence of the phenomenon of rebellion in any part or whole of the country. "In many places there may outwardly be peace and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognising this fact we do not alter the law,⁽⁶⁹⁾ but apply it to the facts as they exist." Thus, war will be said to exist at any place irrespective of the fact whether the courts are there open or not, if aid and comfort can be effectively given to the enemy, having regard to the modern conditions of warfare.

We shall now turn to some of the Irish cases which deal with the nature and effect of a state of war. In R. (Childers) v. Adjutant-General⁽⁷⁰⁾ arguments were advanced on behalf of the petitioner that the alleged state of war was negatived by the fact that the common law courts were sitting and were able to adjudicate on the matter for decision by the judges of the Irish Supreme Court. In refuting the

(68) Sir Frederick Pollock, What is Martial Law? 18 L.Q.R. 152 (1902).

(69) Ibid, at p.156.

(70) (1923) 1 Irish Report 5.

contentions raised and presented so attractively, M. R. O'Connor M.R. conceded that the courts were, no doubt, open but that was not sufficient to establish their jurisdiction. Had they been freely functioning as in time of peace, the absence of a state of war would have been largely proved. The courts had been working "only under difficulties, which were it not for the courage and devotion to duty of its officers, would have been insurmountable." According to him it was absurd to say or hold that the courts were freely discharging their work when the judges required the constant protection of a military guard and the circuits of the judges were regularly interfered with and some of the County Court judges dared not enter their district. This condition of affairs, being the cumulative effect of the presence of a state of war, would undoubtedly oust the jurisdiction of the civil courts. The truth was that, though the courts were outwardly open and seen to be functioning, they had ceased to operate effectively and, when they were themselves struggling for their own existence, it was surely futile to invoke their help in a matter decided by the military authority.

(71)

In Johnstone v. O'Sullivan M. R. O'Connor^{M.R.} seems to have suggested that when a state of war is alleged to exist, it is not very important whether the courts were open but it becomes necessary to inquire whether the civil authorities have failed to secure to the citizens

the rights of life, liberty or property to protect which government is organised. "Is the forcible resistance to authority so widespread, so continuous, so formidable, of such duration that the help of an army must be invoked, not merely in one or two instances, but habitually or constantly, lest the State shall perish?"

(72)

(73)

In R. (O'Brien) v. Military Governor the military authorities contended that they had, so long as the state of war continued, the power of detention if it was expedient in the public interest and, consequently, the court would have no jurisdiction to inquire into or pass judgment upon the conduct of the Commander of the Forces. The issue was whether there was or was not "that deliberate, organised resistance by force and arms to the laws and operations of the lawful government, amounting to war or armed rebellion." Once the court decides that such resistance does exist "it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, as in the present case, or the execution of a capital sentence by a so-called military court."

It is not, however, clear whether the army's immunity durante bello was part of the Crown's prerogative. In Rex (Ronayne and Mulcahy) v. Strickland the King's Bench Division in Ireland held that it was not dependent on the prerogative, but could be treated as an

(72) Ibid, at p.25.

(73) (1924) 1 Irish Report 32.

(74) (1921) 2 I.R. 333.

independent rule of law. G. J. Molony^{C.J.}/observed:

"It is quite unnecessary for us to entangle ourselves in an academic inquiry as to the use of the word 'prerogative.' It is used sometimes in one sense, sometimes in another. The King is head of a standing army with the consent of Parliament. He cannot, it is conceded, merely by proclamation, declare war inside his dominions. It is also conceded that, without such proclamation, a state of things may exist when the military forces of the Crown may be employed "in executing martial law." We hold that when a state of things does exist which justifies the 'execution of martial law', and such is proved to our satisfaction, our hands are tied." (75)

It has now been reasonably clear that the presence of military exigency may lead to the suspension of constitutional guarantees and that the Court will decline to interfere with military decisions so long as the exigency exists. The question may still be agitated as to what happens if the constitutional rights are suspended in districts far away from the scene of active hostilities. In case of foreign invasion, specially in these days of nuclear weapons and ballistic missiles, arguments against the "open court" theory may be applied to justify any executive proclamation or legislative act leading to suspension of these rights over the entire country. It has, however, been doubted whether the exercise of martial law will be justifiable except in districts where a state of war exists, due not to any such

(75) Ibid, at p.334.

foreign war, but to domestic rebellion or insurrection, Opinions have been expressed that even in case of a rebellion "if there were such a degree of danger in the district, by reason of its contiguity to the scene of actual rebellion, and imminent danger of its spreading, that might be enough to excuse an honest exercise of it under supreme authority, or even to justify it legally." (76)

(77)
In Johnstone v. O'Sullivan it was argued that martial law cannot operate in a district where rebellion was not raging. In refusing to accept such contentions ^{L.J.} J. O'Connor said:

"Apart from that, (in his opinion a state of war existed in the district in question) where a state of war exists in a political unit of a territory, I cannot discriminate between one portion of that territory and another; to do so would enable a rebel to claim immunity, in effect, the moment he escaped from more or less disturbed county to a more or less peaceful one." (78)

(79)
In Ex parte Milligan the question was whether martial law could be applied outside the immediate theatre of war. The opinion of the majority of the judges of the Supreme Court was that Congress had no authority under the Constitution to suspend or authorize the suspension of the writ of habeas corpus, thus allowing military tribunals to try

(76) Finlason, Commentaries on Martial Law, 129.

(77) (1923) 2 I.R. 13.

(78) Ibid, at p.25.

(79) (1866) 4 Wall 2 (U.S.).

citizens of the States not within the sphere of active military operations. Their arguments were, as already noticed, that as in those States civil courts were open and transacting judicial business without any interruption, its replacement by military courts were not necessary.

The dissenting opinion of the minority which asserted that Congress had the constitutional authority to do so was based on the following arguments:

"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all power essential to the prosecution of war with vigour and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief ... We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorisation of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety ... It was for Congress to determine the question of expediency."

In this connection it would seem relevant to inquire whether the existence of a state of war in some districts operates to destroy or suspend the civil rights of loyal citizens of other districts. The greater the necessity, the more extensive will executive and military action be. But, as Professor Willoughby has said, "the populace being loyal, and the territory domestic, private rights of person and property still persist, though subject, as in all other cases, to the exercise of the police powers of the State."⁽⁸⁰⁾ According to him, therefore, the military authority will be liable for abuse of their authority. When the civil courts are not closed, rights of action against any interference with personal liberty or property cannot be restrained, except on the grounds of maintaining the efficiency of public services.

The Courts' Power to Determine the Existence of War

When the jurisdiction of a court is challenged, it has the inherent right to determine its own jurisdiction. When, therefore, any particular fact is pleaded in bar of such jurisdiction, the court can inquire whether that fact actually exists, and further whether its existence ousts the court's jurisdiction.

(81)
In an Irish case *G. J. Molony*^{C.J.} was not prepared to accept the contentions of counsel for the military authorities that it was not

(80) Willoughby, The Constitutional Law of the United States (1910) Vol. II, at p.1242.

(81) *R. (Garde) v. Strickland* (1921) 2 Irish Report 317.

competent for the court to decide whether a state of war existed or not and that the statement of the officer commanding as to the existence of war was binding on it. Dispensing with these startling propositions, he said:

"This contention is absolutely opposed to our judgment in
(82)
Allen's case and is destitute of authority, and we desire to state, in the clearest possible language, that this court has the power and the duty to decide whether a state of war exists which justifies the
(83)
application of martial law."

To prevent abuse of the power to declare martial law, it is necessary for the court to decide for itself whether conditions existed which justified the act. Further, it is only Parliament which can take away the jurisdiction of a particular court. In stating the reasons why the mere declaration of martial law was not sufficient to oust the court's jurisdiction, J. Solomon said: "... nor can I find sufficient authority for the argument that, in a case where personal liberty is infringed, a proclamation of martial law has even greater effect than an Act of Parliament suspending habeas
(84)
corpus."

Whether opposition to the established government amounts to a state of war is a question of fact and as such cognisable by the

(82) R. v. Allen (1921) 2 Irish Report 241.

(83) Ibid, at p.329.

(84) Regina v. Naude and Bekker (1901) Sheil : Cape Times Law Report 443 at p.449.

court. Thus, in a case arising in Natal, the Supreme Court of that province said:

"Whether the ordinary civil authority was absent or powerless is a question of fact, upon which the court must ultimately decide, and whether any measure was of such a kind as might be reasonably necessary in a state of rebellion or war, was also a like question of fact, and in the same way within the jurisdiction of the court." (85)

The court has not only the power to decide whether it has jurisdiction, but is bound to do so, as was held in an Irish case:

"The court is bound, when its jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion." (86)

What is the position of the courts during the existence or continuance of war will be considered later, but it may be mentioned that the "question whether war existed or not may, of course, from time to time be a question of doubt" and in that case "doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established." (87) The court would not know whether to restrain its hands or the military measures. To decide on this or the other side would, however, require the court to take all the circumstances into consideration and in the absence of any evidence to the contrary it will presume the existence of war from

(85) Umbilini and others v. G.O.C. (1900) Natal D.R. 86 at p.90.

(86) R. (O'Brien) v. Military Governor (1924) 1 I.R. 32 at 38.

(87) D. F. Marais v. G.O.C. (1902) A.C. 109.

the declaration of martial law itself. "At any rate until the contrary is shown, the fact of the proclamation will be sufficient prima facie (88) evidence of necessity."

But this is not to say that the court is bound by the declaration of martial law. Such a declaration is treated as a strong evidence of the existence of abnormal conditions. Before it would decline to interfere with the executive or military action, "the court must decide on its own judgment whether there was such an emergency as would (89) justify the application of martial law."

Connected with the court's power to determine the existence of war is its power to take judicial notice of a state of war. (90) The court may take judicial notice of a state of war from the evidence (91) adduced by the parties to the dispute.

(92)
In R. (O'Brien) v. Military Governor M. R. O'Connor^{M.R.} said that the court could treat as judicial notice common knowledge that a state

(88) Re Fourie (1900) Cape of Good Hope Supreme Court Reports 173.

(89) Bernard Schwartz, Law and the Executive in Britain, 312.

(90) "But perhaps the existence of a state of war within the jurisdiction is, as suggested in the Marais case, a public fact of which the Court may take judicial notice." Sir Frederick Pollock, What is Martial Law? - 18 Law Q.R. at p.153.

(91) "Even if their lordships did not take judicial notice of it, it is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit." - D. F. Marais v. G.O.C. (1902) A.C. 109 at 114.

(92) (1924) 1 I.R. 32.

of war existed. "It is common knowledge - and what is common knowledge I can take judicial notice of." When it becomes a public fact that the court needs bayonets to protect itself and the general atmosphere occasioned by frequent movements of troops create stir and tension in the city life, the existence of a state of war will be judicially recognised. Such condition of affairs can hardly escape the notice of a judge. Thus, M. R. O'Connor^{M.R.} said: "What do I see on my way down to court every morning? Armoured cars, military lorries full of armed troops, military patrols in our chief thoroughfares, even the approaches to the courts guarded by soldiers with fixed bayonets. When I see all this, surely I cannot say that we have arrived at a state of peace." (93)

The court may also presume the existence of necessity from the declaration of martial law itself. The onus, then, will lie on the petitioner to prove that no such necessity exists. Something more than averment in the petition will be needed to rebut the presumption. (94)
In Queen v. Gildenhuis where the petitioner came before the Supreme Court of Cape Colony for an order to admit him to bail and furnish him with a copy of the evidence taken at the military inquiry, the

(93) Ibid, at pp.36-37. Similarly, in R. (Childers) v. Adjutant General (1923) 1 I.R. at 15, the same learned judge applied his own knowledge to determine the existence of a state of war - "I am sitting here in this temporary makeshift for a court of justice. Why? Because one of the noblest buildings in this country, which was erected for the accommodation of the King's courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins ... "

(94) (1900) 17 Cape of Good Hope S.C. Reports at p.266.

effect of proclamation of martial law was considered. J. Solomon J. expressed the opinion that there was a necessity of presuming a state of war when martial law had been proclaimed. The mere affidavits of the petitioner's attorney to the effect that peace prevailed in the area was not sufficient to rebut that presumption. The court would not, in the absence of some stronger and more convincing proof, go behind the proclamation of martial law and conclude that the necessity for such law did no longer exist.

(95)
In Standen v. Godfrey J. J. Wylde^{c.J.} was of the opinion that when martial law was proclaimed by "the Governor upon his own responsibility and consideration deeming the public emergency such as to warrant his recourse to martial measures," such proclamation conclusively determines the presence of a necessity for introducing such law. The court will not take upon itself to question that emergency, but will presume it to justify the Governor's act of authority."

From another point of view also it is necessary that the court should, instead of trying independently to determine the existence of war, give due weight to the executive decision on this matter, for Government is in possession of all the relevant information. Moreover, it may not be safe to hand it to the court for its inspection. Thus, (96)
in Ex parte Kotze J. Bristowe^{c.J.} was in favour of allowing full freedom to the executive in deciding upon the necessity. Assuming that the

(95) (1851) 1 Searle 63.

(96) 1914 T.P.D. 564.

courts were still sitting and asked to consider the necessity of martial law, they should, he said, be guided by the opinion of the executive officers responsible for the conduct of military operations. "I do not for a moment suppose that a court of law, or any judge, where the most important interests of the nation are at stake, would interpose his own individual opinion as against those responsible for the conduct of military operations."⁽⁹⁸⁾ However, to credit executive declaration of necessity with proper value and importance is one thing, and the court's power to determine it is another.

Judicial Control Revives When Emergency Ceases

If a state of war does not exist, it is the manifest duty of the court to ensure that no person shall be deprived of his or her liberty except in accordance with law.⁽⁹⁸⁾ Also, when the state of war ceases to exist the right of action against the authority will revive.⁽⁹⁹⁾ In Higgins v. Willis an action was brought against an officer of the Crown for damage to the plaintiff's property. In staying the action on the ground that the court had no jurisdiction durante bello, C. J. Molony^{C.J.} said that "so long as that state of war exists, this action cannot be tried; while the plaintiff has a right

(97) Ibid, at p.567.

(98) R. (O'Brien) v. Military Governor (1924) 1 I.R. at 38.

(99) (1921) 2 I.R. 386.

(100)

to have his case tried so soon as a state of war no longer prevails."

It has been asserted over again that martial law is called forth by necessity and necessity alone justifies its existence. From this it naturally follows that martial law cannot operate when the necessity for it ceases. Justice Holmes of the United States Supreme Court, in sustaining two primary housing cases, has admirably enunciated the guiding principle: "A law depending upon the existence of an emergency or certain other state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."⁽¹⁰¹⁾

(102)

In Rex v. Allen the principle was recognised that, when peace is restored, courts will assert their jurisdiction to try any person guilty of committing an act which was not necessary, if in the meantime an Act of Indemnity has not been passed. "After the war is over, persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case - unless these acts have in the meantime been covered by an Act of Indemnity."⁽¹⁰³⁾

(100) Ibid, at p.387.

(101) Chasleton Corp. v. Sinclair (1924) **164 U.S.** at **547**

(102) (1921) 2 I.R. 241.

(103) Ibid, at p.264. Similar opinion was expressed in Regina v. Naude (1901) Sheil 446 - "When the proper time does arrive, as has consistently been laid down by this court, the persons who have committed wrongful acts, whether they be military officials or others may be made amenable to the law."

On a proclamation of martial law the usual practice is to issue
 (104)
 regulations and notices. In a case arising in South Africa it was
 contended that such regulations and notices still had the force of
 law, though martial law was discontinued. The ground urged in support
 of such contention was that these had not yet been repealed by a formal
 statute. In expressing disagreement with such views J. Curlewis said:
 (105)

"If we look at Government Notice No. 40 of 1915 it is clear that
 it was issued for the purpose of Martial Law. It is headed "Martial
 Law Regulations." Therefore it appears to me that the Government
 Notice only has the force of law as long as Martial Law exists, and
 that when the object and reason for the regulation has ceased the
 regulation itself will cease to have the force of law. It seems to me
 quite unlikely that the legislature intended all these Government
 Notices to have the force of law until they were repealed by a formal
 (106)
 statute."

(104) Halder v. Minister of Defence (1915) Trans. Prov. Div. 622.

(105) "Whereas it is deemed necessary and expedient to make special
 provision for dealing with British subjects of enemy extraction,
 who by word and action show themselves inimical to the
 Government and Parliament of the Union and to the welfare of
 the State, it is hereby notified that the regulations set
 out in the annexure to this notice will be enforced
 throughout the Union with effect from date hereof."

(106) Ibid, at p.630.

Some misunderstanding arose in the past out of the language used by Lord Halsbury in the Marais case and it was thought, though only for a short time, that martial-law action was beyond any judicial control even when the emergency was over. But it has rightly been remarked that "if it (the decision in the Marais case) is intended thereby to affirm that military authorities cannot, in any case when the war is ended, be sued for acts of violence inflicted upon citizens during war, or done to their property whilst hostilities are raging, then it is a proposition at variance with what has long been, and what (107) is still believed to be, the law."

In most cases, however, the executive or the military authority are, as soon as the proclamation of martial law is withdrawn, "protected (108) from legal vindication by legislative indemnity," so that even though the courts are willing to assume jurisdiction, they will be debarred from doing so. And there is nothing illegal in passing such Acts of Indemnity, permitting a short and effective defence by the authority administering martial law.

The reason for the court's interference when apparently there is no interruption in the course of justice is that trial by martial (109) law is illegal in such circumstances. Wolfe Tone's case will ever remain a splendid instance of the judicial assertion of supremacy of

(107) Cyril Dodd, The Case of Marais, 18 L.Q.Rev. at 148 (1902).

(108) Standen v. Godfrey (1851) 1 Searle 61.

(109) The Trial of Theobald Wolfe Tone (1798) 27 State Trials 614.

(110)
the law.

The facts of this case were that in 1798, Wolfe Tone, an Irish rebel, was captured during a French invasion of Ireland and was tried by a court-martial and sentenced to be hanged. In moving an application for a writ of habeas corpus before the Irish King's Bench his counsel urged:

"I do not pretend to say that Mr. Tone is not guilty of the charges of which he was accused; I presume the officers were honourable men; but it is stated in the affidavit, as a solemn fact, that Mr. Tone had no commission under His Majesty, and therefore no court-martial could have cognisance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the great criminal court of the land. In times when war was raging, when man was opposed to man in the field, courts-martial might be endured, but every law authority is with me, while I stand upon this sacred and immutable principle of the Constitution - that martial law and civil law are incompatible; and that the former must cease with the existence of the latter. This is not the time for arguing this momentous question. My client must appear in this Court. He is cast for death this day. He may be ordered for execution while I address you. I call on the Court to support the law. I move for a habeas corpus to be directed to the

(110) About this case Dicey said: "Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence than Wolfe Tone's case The Law of the Constitution (1959) Tenth edition, at p.293.

provost-marshal of the barracks of Dublin and Major Sandys to bring up the body of Mr. Tone.

Lord Chief Justice (Kilwarden) - Have a writ instantly prepared.

Mr. Curran - My client may die while this writ is preparing.

L.C.J. - Mr. Sheriff, proceed to the barracks, and acquaint the provost-marshal that a writ is preparing to suspend Mr. Tone's execution and see that he be not executed.

(The Court awaited, in a state of the utmost agitation, the return of the sheriff.)

Mr. Sheriff - My Lords, I have been at the barracks, in pursuance of your order. The provost-marshal says he must obey Lord Cornwallis.

Mr. Curran - Mr. Tone's father, my Lords, returns, after serving the habeas corpus, he says General Craig will not obey it.

L.C.J. - Mr. Sheriff, take the body of Mr. Tone into your custody. Take the provost-marshal and Major Sandys into custody and show the order of this Court to General Craig.

Mr. Sheriff (who was understood to have been refused admittance at the barracks) returns - I have been at the barracks. Mr. Tone, having cut his throat last night, is not in a condition to be removed. As to the second part of your order, I could not meet the parties.

L.C.J. - Let a rule be made for suspending the execution of Theobald Wolfe Tone; and let it be served on the proper persons."

Again, one more instance, as illustrating the assertion of judicial authority when martial law is over, is provided by the following incident:

When in 1814 New Orleans was being invaded by the British Forces, General Jackson, commanding the American Army, declared martial law. A civilian published a libellous article containing criticisms of the General's acts. He was arrested by the order of General Jackson, but, on an application for a writ of habeas corpus, Federal Judge Hall ordered his release. The judge himself was arrested and sent beyond the military lines. When, however, civil jurisdiction was restored, the judge fined General Jackson one thousand dollars for contempt, which the latter quite promptly paid. Later, however, Congress returned him this money with interest.

The seemingly high-handed step taken against Judge Hall was no doubt an unusual one, but so also was the judicial indiscretion in issuing the writ at a time which demanded the subordination of all other activities to military control. The recital of events set out above points to these conclusions, the supremacy of the military authorities and, when necessary for the success of their operations, the entire suspension of all ordinary laws when actual war is raging; the re-emergence of the normal administration by the civil government when the necessity for martial law ceases.

CHAPTER 7THE EXTENT OF ARBITRARY EXERCISE OF POWERS DURING MARTIAL RULE1. Judicial Problems on Assumption of Powers in an Emergency

The Courts, as already seen, would, during the continuance of a state of war, ordinarily decline jurisdiction to entertain proceedings against any officer or member of the armed forces acting in the exercise of his duties. It has also been noticed how long they should refrain from calling a halt to the unchecked exercise of such powers. When there has been a declaration of martial law, the military authority has usually claimed power to supersede all civil laws, leading to a virtual paralysis of the normal functions of the civil government, especially
(1)
the courts. For two reasons it would seem difficult to concede such an exorbitant claim. First, doubt still exists in the minds of the English jurists as to whether martial law can be declared at all in the absence of a state of war throughout the country. Secondly, one cannot lose sight of the fact that the courts in England, the Commonwealth countries and the U.S.A. sat as usual during the two major wars of this century, though, of course, express legislative measures were enacted to meet emergencies arising or likely to arise in consequence of hostilities.

(1) "The idea seems to be growing that it is the prerogative and function of the military to substitute itself for all civil authority, and that, while it is in control, the constitutions, courts and laws may be suspended and set aside." Ballantine, Unconstitutional Claims of Military Authority (1915) 24 Yale Law Journal 189.

Yet it has been abundantly recognised by the courts that the exigencies of the situation caused by a formidable rebellion or an internecine civil war may legally justify the abandonment of all constitutional forms. But there have been occasions for judges, even while martial law was in force, to protect the citizen's right to his life, liberty or property against interference not warranted by the laws of the land.⁽²⁾

Some confusion is bound to arise from the seemingly irreconcilable facts inherent in the situation. On the one hand the military authority, as already noted, has the right not to be interfered with durante bello; on the other hand the citizen should not be made to suffer unnecessarily from the unrestrained acts of the armed forces. The officer commanding the armed forces may reasonably require the judiciary to concede full independence without any check. He may validly argue: "You must judge my plan of campaign as a whole, and not take single acts out of their context. You have already, by refusing to interfere with me, admitted that an occasion for exceptional measures has arisen. I have succeeded in suppressing the rebellion; can you, as laymen, say that, by the exercise of this or that much less violence, I could have done as well."⁽³⁾ Such a claim, based on the plea of expert knowledge and judgment is difficult to resist.

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- (2) Trial of Theobald Wolfe Tone (1798) 27 Howell's St. Trial 614; Sterling v. Constantine (1932) 287 U.S. 378; Duncan v. Kahanamoku (1945) 327 U.S. 314; Higgins v. Willis (1921) 2 Irish Report 386.
- (3) Keir and Lawson, Cases in Constitutional Law (1954) 3rd ed., p.436.

As a matter of fact judicial practice is now firmly settled; it will never interfere so long as the state of war or similar circumstances exist. But, while admitting the necessity of recognising exceptional cases, the court might reply that, if on occasions when no great danger to the public safety was manifest and in cases of manifest injustice, it refused to protect the citizen, "it would leave too large (4) a loophole for tyranny and reckless violence." In spite of judicial pronouncements that there can be no interference with the military action, the courts have not hesitated to exercise jurisdiction to rectify gross irregularities. On occasions when the military authority took an exceedingly high view of the prerogative to suppress disorder or defend the country, judicial disapprobation has followed.

Of course, Parliament or the Legislature is wont by retro-active legislation to render all acts valid when done in good faith. By passing an Act of Indemnity it can provide the authorities with a short and convenient defence to all awkward charges; it may also provide for compensation for those who have been harshly treated during the emergency. But whether indemnifying legislation has been passed or not, if the authority did not act bona fide, the rule enunciated (5) in Wright v. Fitzgerald will be applicable.

(4) Ibid, at p.438.

(5) (1799) 27 Howell's State Trial 759.

Here, an action was brought by Wright, a teacher of the French language at a school in Clonmell in Ireland, against Fitzgerald, high sheriff of the county of Tipperary, for causing bodily injury by assault and battery. The damages were laid at £1000. Commenting on Fitzgerald's mode of behaviour one of the members in the Irish House of Commons said that "his mode was first to sentence, then punish and afterwards investigate."⁽⁶⁾

The following charge to the jury clearly brings out the considerations which should move the judicial mind in judging an executive act:

"The jury were not to imagine that the legislature, by enabling magistrates to justify under the Indemnity Bill, had released them from the feelings of humanity, or permitted them wantonly to exercise power, even though it were to put down rebellion. No, it expected that in all cases there should be a grave and serious examination into the conduct of the supposed criminal; and every act should show a mind intent to discover guilt, not to inflict torture. By examination or trial he did not mean that sort of examination and trial which they were engaged in, but such examination and trial, the best the nature of the case and the existing circumstances would allow of. That this must have been the intention of the legislature was manifest from the expression - "magistrates and all other persons" - which proved

(6) Ibid, at p.770.

that as every man, whether magistrate or not, was authorised to suppress rebellion, and was to be justified by that law for his acts, it is required, that he should not exceed the necessity which gave him the power; and that he should show in his justification, that he had every possible means to ascertain the guilt which he had punished; and above, no deviation from the common principles of humanity should appear in his conduct."⁽⁷⁾

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In Higgins v. Willis ^{Q.J.} Ø. J. Molony of the Irish Supreme Court went as far as to hold that "when the war was over the acts of the military during the war, unless protected by an Act of Indemnity, could be challenged before a jury, and that in that event even the King's command would not be answer, if the jury were satisfied that the acts complained of were not justified by the circumstances then existing, and the necessities of the case."⁽⁹⁾

⁽¹⁰⁾
Governor Wall's case will ever remain the best example of the consequences of a malicious abuse of powers entrusted to the executive and the refusal of Parliament to cover such acts by passing an Act of Indemnity. The crime committed by Governor Wall was the murder of Sergeant Armstrong, in 1782, by inflicting on him eight hundred lashes with a special species of rope. The charge against the deceased was

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- (7) Ibid, at p.765.
 (8) (1921) 2 I.R. 386.
 (9) Ibid, at p.388.
 (10) (1802) Howell's State Trials 51.

that of insubordination and raising a mutiny among the soldiers. As a matter of fact he, along with others, went to press the pay-master, who was about to leave the island with the Governor, for arrears of pay.

In the trial the whole question turned on the decision whether there was mutiny or "tumultuous disobedience by a military man to his military superior." As the Attorney-General contended "if there did exist, in point of fact, a mutiny within his majesty's garrison, which it required the strong arm of power to suppress, if it was a mutiny so enormous in its size, so dangerous in its probable and immediate consequences, as to supersede the ordinary forms of trial for that or such like offences," the jury must not conceive "this or any other man similarly circumstanced, as being other than not only an innocent but even a meritorious man, who uses the effective powers with which his situation arms him or which he has it within his reach to command and use, for the discharge of the trust, and the protection of the interests committed to him."⁽¹¹⁾ But he conceded that if the mutiny was brought forward "as a pretence, and in order to serve as a cover and cloak for abused power, and the malicious perversion of legitimate authority" and only to enable the Governor to inflict unauthorised punishment on the object of his vengeance, then he was certainly guilty of committing the highest crime. Accordingly he must stand condemned of "having

(11) Ibid, at p.55.

abused the great trusts and authority of his situation, for the oppression of one of his majesty's subjects, for whose protection,
 among other persons, that authority was originally given."⁽¹²⁾

As, however, the jury could not come to the finding that there was a mutiny, or such a court-martial as could be had, or that there was any reasonable notice to the deceased that he was charged for such and such crime or was called upon to say how he joined one of those mutineers, the verdict of guilty was given and the Governor was hanged.

2. The Need to Control Exercise of Arbitrary Powers

Paramount necessities of the moment not only furnish the occasion for and justify the exercise of arbitrary powers, but also may lead to conferment of wider powers than are actually necessary. In spite of harsh criticism against assumption of such powers or their sanction by previous legislative prescription, they have been considered imperative, both by the Courts and the legislature. But as "power is of an
 encroaching nature"⁽¹³⁾ C. J. Cockburn^{C.J.} expressed the feeling that to guard against its immoderate and unrestrained use it should be defined. Thus, while referring to current notions that the extent of military

(12) Ibid, at p.55.

(13) Madison, The Federalist, quoted by Sir C. K. Allen, Law and Order (1956) 2nd ed., at p.11.

powers knew no limit on a declaration of martial law, he said that "if such as the system of law under which British subjects can be tried for their lives or their liberties, it is time that Parliament should interpose and put some check upon a jurisdiction so purely arbitrary, (14) despotic and capricious."

Though in England martial law has not been proclaimed since it was condemned by the Petition of Right in 1628 and common law powers are deemed sufficient to cope with the few outbreaks of popular frenzy which have occurred since that date, yet during the First World War (15) the whole of England in effect was put under "martial law." All wartime legislation has been based on the principle that, if there is no need to resort to exceptional powers, prior legislative action to define them is necessary. The wartime statutes illustrate how, without curtailing the freedom of the military forces in effectively dealing with the menacing emergencies, it is possible to retain normal legislative control. To recognise the need to arm the executive with the widest possible powers to meet any emergency is not to concede that Parliament and the Courts should cease to function. The whole position has been admirably stated by the Committee on Ministers' Powers:

(14) R. v. Nelson and Brand (1867) Special Report, p.23.

(15) O. Hood Phillips, Constitutional Law, 2nd edition, p.550 (1957). "Shortly after the outbreak of war in 1914, the whole of the United Kingdom was placed under martial law by the Defence of the Realm Act, 1914, and British subjects and aliens remained under martial law in connection with certain offences for some months."

"In a modern State there are many occasions when there is a sudden need of legislative action. For many such needs delegated legislation is the only convenient or even possible remedy. No doubt, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outline of the legislation shall be.

But emergency and urgency are matters of degree; and the type of need may be of greater or less national importance. It may be not only prudent but vital for Parliament to arm the executive Government in advance with almost plenary power to meet occasions of emergency, which affect the whole nation - as in the extreme case of the Defence of the Realm Acts in the Great War, where the exigency had arisen; or in the less extreme case of the Emergency Powers Act, 1920, where the exigency had not arisen but power was conferred to meet emergencies that might arise in the future ...

But the measure of the need should be the measure alike of the power and of its limitation. It is of the essence of constitutional Government that the normal control of Parliament should not be suspended either to a greater degree, or for a longer time than the exigency demands."⁽¹⁶⁾

In the Commonwealth countries whenever disturbances of a serious nature have occurred or were apprehended, statutes were passed conferring necessary power on the Executive. Besides, during the two World Wars

(16) Report of the Committee on Ministers' Powers, 1932, p.52.

all these countries provided the respective governments with sufficient powers to ward off the dangers of a totalitarian war.

Though to declare martial law is an executive act, it really involves a delegation of power, one could almost say abdication by the other two organs of the government. The declaration of martial law brings out two processes. First, by empowering the Executive to declare martial law Parliament enables it to legislate. For, as has been said, the declaration "is neither more nor less than to enact that the law of the land shall be for the time suspended, and a different (17) law substituted for it. Secondly, on a proclamation of martial law, the military authorities indulge in what is known as subordinate legislation. Martial law regulations and notices are a regular feature of such a regime.

The delegation need not be considered as complete abdication by the legislature of its functions. There is, as we have seen, need of legislative action in defining the extent and powers of the executive.

The question will also arise whether such delegation or subordinate legislation thereunder could be judicially controlled. The practice of the English Courts in this respect has been different from that in America. The doctrine of supremacy of Parliament debars the judiciary in England from reviewing delegation of power to the

(17) Per ^{C.J.} C. J. Cockburn in R. v. Nelson and Brand (1867) Special Report, p.70.

Executive. "The established supremacy of Parliament enables it to take any measures it deems necessary to cope with the emergency. The constitutional problem of delegations to the Executive cannot, of course, arise in the American sense, for whatever powers Parliament itself possesses it may confer upon others."⁽¹⁸⁾ What, then, can the Court do? As the only question when "an Act of Parliament, or a statutory regulation ... is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject,"⁽¹⁹⁾ is what is the precise extent of the powers given, the duty of the courts is to interpret. "The function of the judiciary under the English system is reduced to one of interpretation. The courts cannot control the delegation, they can only see to it that the Executive remains within the bounds of the powers conferred."⁽²⁰⁾

As a matter of fact, therefore, courts in England cannot apply the doctrine of ultra vires to emergency legislation, though protests⁽²¹⁾ were voiced against conferring great powers on the Executive. The same doctrine was, however, sometimes quite successfully invoked to invalidate regulations made thereunder. But in a majority of cases when such legislations were impugned before the courts as in excess of the powers conferred by the relevant statutes, the judges were manifestly reluctant to declare them to be so, for obviously they were guided

(18) Bernard Schwartz, Law and the Executive in Britain, 1949, p.314.

(19) Per Lord Wright in Liversidge v. Anderson (1942) A.C. p.261.

(20) Bernard Schwartz, Law and the Executive in Britain, p.314.

(21) Ibid, p.261.

by the all too important principle that "if extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the necessity."⁽²²⁾

Before any discussion as to whether there is any need of judicial review of executive action during emergency, it must be mentioned that the courts' refusal to intervene where emergency actually prevails and while it prevails was inspired by judicial considerations and sense of the need of the hour, though sometimes the statute itself may have contained a prohibition against any interference by the court.⁽²³⁾

It would be a mistake to suppose that the need for judicial control of arbitrary exercise of power exists only in cases of emergencies involving threats to personal liberty. Bearing in mind the limitations on the courts' power to review the delegation of power to the Executive and in certain circumstances even the subordinate legislation, the principle should be recognised that "there is danger of arbitrariness in all exercises of power, and only through constant control can illegality be minimised."⁽²⁴⁾ Judicial utterances are not lacking as to the need of trusting the Executive or of relying on the executive good faith, because the nation is "merely lending its liberty for extraordinary purposes" and for a limited period; "the good faith of the Executive - the administrative desire, in fact, to conform to the legislative mandate - is irrelevant in this connection."⁽²⁵⁾ For, "legal

(23) Ibid, at p.167.

(24) Ibid.

(25) Ibid.

rules, unlike those in the physical sciences, do not have fixed areas of strains and stresses. There is a tendency to stretch legal rules to the breaking point permitted by expediency - to carry out the desired action even at the risk of illegality.⁽²⁶⁾ Every sort of executive action not permitted by the ordinary law of the land needs judicial control.

If the pressing necessities during any emergency prompt the Executive in some matters to ask for "greater powers than were really necessary, it is only a captious critic who would blame it harshly."⁽²⁷⁾ True, everyone would recognise that stern measures are necessary in stern times and sacrifices and inconveniences are inevitable. But, as has also been rightly said:

"It is, however, necessary to realise exactly what those sacrifices and inconveniences were, not for the hardships which they inflicted at a time when everybody accepted hardships, but for their constitutional implications if they should come to be regarded as a normal and desirable form of government."⁽²⁸⁾

Totalitarian methods might be imitated to vindicate democracy but, that its soul may not be lost in the process, it is essential to remember that "it is part of the democratic process, even during war, to be vigilant that emergency expedients do not exceed the real

(26) Sir C. K. Allen, Law and Orders, 1956, at p.54.

(27) Ibid.

(28) Ibid.

necessities of the situation as, from their very nature, they always
(29)
tend to do."

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Judging martial law as "the public law of necessity", it may fairly be argued that as the necessity would not be the same on all
(31)
occasions, the application of martial law would also differ, thus creating an area of no-man's land between the courts' power to review administrative decisions and the supremacy of the commander's will. It is an area where both the judges and the generals might feel reluctant to encroach on the sphere of the other. The courts, while remembering that "where actual war is raging acts done by the military
(32)
authorities are not justiciable by the ordinary tribunals," proceed not only to review but also to restrain the acts of the military authority, if they find them not justified by, though done in the name of, necessity. Faced with the alternative of closing the courts in the twilight zone between peace and war, military authorities have submitted to judicial control. On reviewing the cases in which judges have pronounced on military measures, a basic distinction will be noticed between two kinds of martial law - the extreme or absolute type, and the mild or qualified type. In the former case the civil government and the ordinary courts of the country are suspended. The

(29) Ibid.

(30) "Necessity calls it forth, necessity justifies its existence and necessity measures the extent and degree to which it may be employed." - Weiner, A Practical Manual of Martial Law, p.16 (1940).

(31) "Martial law, however, is of all gradations." - 49 Mont. 454 at 476 (1914), Ex Parte McDonald.

(32) Ex Parte Marais (1902) A.C. 109 at 114.

question of judicial review is then completely excluded and becomes almost irrelevant. In the latter case troops are requisitioned but they act more or less in concert with the civil government. They are given certain civil powers, such as those of arrest and detention, which, it is submitted, are not the same as trial and conviction, which are judicial functions. (33) As in this case the armed forces are not allowed a completely free hand, the civil courts retain the power to review their acts. Though countries in the Commonwealth provide but few instances of this type of qualified martial law they are not uncommon in America where State Governors have resorted to martial rule on occasions that could by no stretch of imagination be deemed rebellion or insurrection.

(34)
In one such case, Chief Justice Hughes of the United States Supreme Court, on the finding that there was no actual uprising and no interference with the normal process of administration, nor any attempted or threatened violence excepting the obstruction caused by the General commanding the armed forces, held that the Court should not impose any limitation on the power of the Governor to declare martial law, but it could subject any measures resorted to under such a declaration to immediate restraint. Where, though circumstances justifying a declaration of martial law did not exist, it had been

(33) Charles Fairman, Martial Rule and the Suppression of Insurrection (1929) 23 ILLINOIS LAW REVIEW 706 at p.783.

(34) *Sterling v. Constantine* (1932) 287 U.S. 378.

proclaimed, the military authority could not impede the normal functioning of the court. *Ø. Ø. Hughes*^{C.J.} said:

"If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal Court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared."⁽³⁵⁾

Where there is no apparent need for declaring martial law, the court will only uphold such measures taken by the authority as have a reasonable relation with the circumstances calling it forth.⁽³⁶⁾

Thus the cases where courts refused to endorse exorbitant claims of the military authority and refused to sustain absolute rule by military decrees and regulations, go to prove that martial law can be qualified, though such a concept has been criticised as a "pernicious doctrine."⁽³⁷⁾ The concept of qualified martial law has juristic support. As Schwartz has said:

"The cases of abuse and their restraint by the courts show that martial law action is subject to constitutional limitations; they do not disprove the thesis that martial law can be qualified under the

(35) Ibid, at p.404.

(36) Ibid.

(37) U.S. v. Minoru Yasui, 48 F.Supp. 40 at 49.

proper circumstances. It is submitted that the better rule and the one more consonant with modern conditions, especially where the Federal Government in its exercise of the war power is concerned, is that a state of martial rule can exist only to the extent which military necessity may require. It is, indeed, in most cases something less than the complete taking over of civil government, and should operate although the ordinary courts are functioning where the circumstances so require."⁽³⁸⁾

From all the foregoing considerations one would feel induced to agree with the following views expressed by G. J. Innes^{C.J.} of the South African Supreme Court on the necessity of legislation regulating exercise of powers during martial rule:

"In no respect can martial law be regarded as a good thing: it is at the best a lamentable necessity. It imposes a great responsibility upon the executive Government; it operates with inevitable harshness in certain cases, and it saps the political fibre of the people. A retrospect of South African history during the last fifteen years~~may~~ well give rise to inquiry as to whether the legislature would not have done well to regularise and at the same time control the operation of the system. With the action of a military commander within the area of actual hostilities interference would be alike undesirable and impossible. But in places where there are no military operations in

(38) Bernard Schwartz, Law and the Executive in Britain (1949) at p.309.

progress, and where yet it may be necessary to exercise special powers of supervision and control the position is very different. It ought to be possible to legislate for such localities in a way that would lessen the burden of martial law both for the Government and the people."⁽³⁹⁾

Further, he said that such statute should embody the circumstances under which martial law could be proclaimed, things that may be done and more important still, things that may not be done, provisions for indemnifying those acting within the limits of the powers conferred. If such a statute were passed two results would follow: (i) to relieve those in authority from the temptation to retain martial law after the necessity for it had disappeared, and (ii) to prevent the institution of civil actions pending the passage of an Indemnity Bill.

3. Importance of Judicial Review

Apart from controlling the exercise of inherent powers to meet the emergency, as already seen, there are other considerations which may necessitate judicial review and interference. Statutes have occasionally been passed to define the limits of executive action during war and rebellion, the conspicuous instances being war-time

(39) Krohn v. The Minister for Defence (1915) APP. DIV. 191 at 202.

legislations, both in the United Kingdom and elsewhere. To interpret an Act of Parliament is, as is well known, a judicial function. But it is also the duty of the courts not to allow anybody to exceed the powers conferred on him.

(40)

Thus, in a case involving the loss of personal liberty, the Judicial Committee of the Privy Council had to consider whether a colonial Governor could abrogate the existing law of the colony and proclaim martial law. The Act of annexation of certain African Territories empowered the Governor of the Cape Colony to add to the existing laws, already in force in the annexed territories, such laws as he "shall from time to time by proclamation declare to be in force in such territories." In 1895 the Governor while acting "in virtue of powers vested in me by law," issued a proclamation which overthrew the established law of the territories with respect to trial, arrest, conviction and punishment. The respondent was condemned to imprisonment without any trial. The place and duration of his imprisonment was left to the uncontrolled discretion of the Governor.

So far as the Proclamation went, Lord Watson said:

"It is an edict, dealing with matters administrative, judicial, legislative and executive, in terms which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and

(40) Sprigg v. Sigcau (1897) A.C. 238.

(41) Pondoland Annexation Act, 1894.

unfettered legislature, or some person or body to whom their functions have been lawfully delegated. If the Governor and High Commissioner of the Cape Colony could be shewn to have occupied one or other of these positions, a Court of law would be compelled, however unwillingly, to respect his proclamation. If he did not, then his dictatorial edict was simply an invasion of the individual rights and liberty of a
(42)
British subject."

In his opinion the Proclamation exceeded the authority delegated to the Governor in two particulars. First, it was a new and exceptional piece of legislation and differed entirely in character from any of the laws, statutes and ordinances which he was authorised to proclaim. Secondly, it repealed in substance the whole provisions of the existing law with respect to criminal proceedings and thus adversely affecting the respondent. Upon these grounds the conclusion seemed inevitable that the issue of the Proclamation was an illegal and unwarrantable act.

(43)

Egan v. Macready dealt with a very special case arising during the Irish disturbances at the end of the First World War. The militant forces of the Crown were called in aid, and Parliament, in order to legalise the operations of the armed forces and at the same time to
(44)
safeguard the liberties of the subject, passed an Act conferring special

(42) (1897) A.C. at p.246.

(43) 1921 Irish Report 265.

(44) The Restoration of Order in Ireland Act, 1920.

powers on the armed forces, but imposing conditions. There was power to try any person whether military or civilian, rebel or loyalist, by court-martial, but in the case of a trial for a capital offence the court-martial had to include a member nominated by the Lord Lieutenant of Ireland and certified to be a person of legal knowledge and experience; a person tried and convicted by a court-martial could only be awarded the punishment prescribed for such crime by any existing statute or common law.

The court, in deciding the question whether the military authority could disregard or by-pass these limitations because they felt that the special powers were not sufficient to meet the emergency, posed a few queries. Could it be contended that a military authority invested by Parliament with this special power was entitled to ignore the Act? Or could they say "No doubt the Act was passed to meet an emergency, and we are of opinion that we must be absolutely unrestrained, but we find the emergency greater than was contemplated, and we shall act as we think right, no matter what the Act of Parliament"? Or could they say "A court-martial specially constituted was prescribed for us, but we won't have such a court-martial. Besides, we shall have a court of our own, constituted as we think right, perhaps of a lance-corporal and two privates. Further, we must fix our own punishments"?

To those who were risking their lives in suppressing a rebellion these sentiments would probably seem natural, but a court of law had only a short answer to them: "If the emergency is greater than was

contemplated, is it not for Parliament to give further powers or to
 (45)
 remove the limitations imposed?" Could it be assumed, M. R. O'Connor M.R.
 asked, that Parliament was in a lethargic condition, incapable of
 energetic action? The contention of the military authorities was that
 the prerogative of the Crown to act as necessity demanded when dealing
 with a state of war was in no way curtailed by Parliamentary legislation
 on the subject, a contention which was directly negated by the decision
 (46)
 in Attorney-General v. De Keyser's Royal Hotel. Moreover, to concede
 the claim of the military authority to override legislation enacted
 to meet the circumstances created by a state of war would seem to call
 for a new Bill of Rights.

Incidentally, the difficulty created by the rule that legislation
 on matters comprised in the prerogative inevitably restricts the pre-
 rogative has resulted in a tendency in the Indo-Pakistan sub-continent

(45) Ibid, at p.274.

(46) (1920) A.C. 508. In holding that when a statute is passed it
 abridges the Royal Prerogative, Lord Atkinson said: "... in all
 this legislation there is not a trace of a suggestion that the
 Crown was left free to ignore these statutory provisions, and by
 its unfettered prerogative do the very things the statutes
 empowered the Crown to do, but free from the conditions and
 restrictions imposed by the statutes. It is quite obvious that
 it would be useless and meaningless for the Legislature to
 impose restrictions and limitations upon, and to attach conditions
 to, the exercise by the Crown of the powers conferred by a
 statute, if the Crown were free at its pleasure to disregard
 these provisions, and by virtue of its prerogative do the very
 thing the statutes empowered it to do. One cannot in the
 construction of a statute attribute to the Legislature (in the
 absence of compelling words) an intention so absurd." Ibid,
 at p.559.

and in Burma, in recent years, to rely on the prerogative, when dealing with war and rebellion, rather than have resort to legislation.

(47)
In R. v. Allen, ^{C.J.} G. J. Molony expressed a different opinion as to the source of power of the military authority. He felt unable to accept the reasoning of the decision in Egan v. Macready. ^{C.J.} G. J. Molony had held that in spite of the Restoration of Ireland Act, 1920, and the Firearms Act, 1920, the proceedings of a military court derived their sole justification and authority from the existence of actual rebellion. The military authority could resort to any measures necessary to restore peace and order. By the regulations made under the former Act a court-martial could impose the maximum penalty for keeping firearms or ammunition by sentencing to penal servitude and under the latter Act a sentence of three months' imprisonment in England or two years in Ireland. The petitioner argued that when a statutory court-martial was empowered to cope with the state of disorder then existing in Ireland, it would be unfair if at the same time and place a military court should be allowed to try for a similar offence and inflict a greater punishment, thus depriving the accused of the legal safeguards available under those Acts. Though the objection had considerable force, ^{C.J.} G. J. Molony felt that it was "one rather for the consideration of Parliament than for this court, which cannot, durante bello, control the military authorities, or question any sentence imposed in the exercise of martial law." He said that when martial law prevailed the

military discretion could not be controlled by the court and the military authorities were at liberty to "use special military court machinery and to impose any sentence, even death, without being disabled, in another case, from applying procedure of a more moderate and limited character, or vice versa." It appears that his conclusions were based on the fact that when the proclamations were made introducing the special court machinery, Parliament was sitting and had notice of the divergence between the practices of such court and those of a statutory court-martial and still it did not interfere. It seems that his reasoning was not correct.

4. Martial Law Proceedings Not Recognised by Ordinary Courts

Assuming, however, that in some cases the Court may feel compelled to intervene in the military sphere, it becomes necessary to consider two questions, first, whether it will review decisions by military courts under martial law regulations; secondly, whether it will issue writs to these courts.

It is, of course, needless to mention that before the courts would do either of the two things referred to above, they will be inclined to exercise caution in interfering with military action. Thus, the Supreme Court of Cape Colony refused an application asking for an order to the military authorities to issue a pass to the petitioner which would enable him to proceed from Cape Town to an

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adjoining district where he had bought a farm. In the opinion of Buchanan, Acting C.J., the Court should "show great caution before exercising any censorship over the acts of the military in places where martial law properly exists" and therefore he was unwilling to interfere with martial law regulations which controlled the movement of individuals from one place to another.

It is settled beyond doubt that the courts do not ordinarily review the decisions of the military courts, excepting where their constitution or jurisdiction is challenged. But the position is altogether different when military tribunals are set up to try civilians or ordinary magistrates' courts are invested by the military authorities with the power to administer martial law regulations. Some of the South African cases would unmistakably show the assertion of judicial supremacy in this respect.

In reviewing certain proceedings in a magistrate's court purporting to have been taken under the direction of the military authorities, J. Buchanan maintained that, being an inferior court, a magistrate's court was subject to review by the Supreme Court. A magistrate's court as such had no right to administer martial law. He, however, expressed the opinion that the case would have been different if the petitioners were tried by a court composed of the members of the armed forces.

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(48) Ex parte Minaar (1902) Sheil 217.

(49) Rex v. Kalp (1903) 12 Cape Times Reports 1008.

A conviction by the Resident magistrate, specially deputed by the military authority, was quashed by the Supreme Court of the Cape Colony on the ground that the mere insertion of the expression "Martial Law Jurisdiction" on the top of the charge sheet did not invest the magistrate with the authority to decide cases of contravention of martial law. G. J. De Villiers^{c.J.} said that "the fact that the magistrate purported to exercise Martial Law jurisdiction does not render valid what he did in his capacity as magistrate. In that capacity he had no martial law jurisdiction whatever, and could not be specially deputed by the commandant to decide cases of contravention of martial law."⁽⁵⁰⁾

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Similarly, in Rex v. Link and Wenner, the conviction of the petitioners were quashed as there was no civil warrant for their detention and the trial was before a civil court at the instance of the military authorities. J. Buchanan said: "The Court had consistently laid down in all cases which had come before them that while they would not interfere with the military authorities in martial law districts, at the same time the military authorities could not expect any assistance from the civil courts to enable them to carry out their orders. The magistrate, as a civil functionary, had no right to try this case ... "⁽⁵²⁾

(50) Rex v. Van Vuuren (1903) 12 Cape Times Report 902.

(51) (1903) 12 Cape Times Reports 144.

(52) Ibid.

(53)

In Rex v. Walters the Supreme Court of Cape Colony quashed the proceedings before a magistrate's court as they were found grossly irregular. The applicant was tried for contravention of certain martial law regulations. His grievance was that the magistrate did not ask him to plead or produce witnesses and further denied him the opportunity of cross-examination. He was not allowed to have any legal assistance. As the military authority refused to produce the records in the court below, the Supreme Court based its decision on the facts disclosed in the petitioner's affidavit.

In the cases where the magistrate purported to act, not in his capacity as magistrate but as Deputy Administrator of Martial Law, the Court, however, showed reluctance to interfere with his judgment. In
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Rex v. Van Reenan two criminal judgments came up for review before the Supreme Court of Cape Colony. The reasons for its refusal to interfere were "this Court cannot recognise the court of the Deputy Administrator of Martial Law without recognising it as a legal court." It was not a legal court inasmuch as its constitution was not authorised by the law. Moreover, it was administering a system of laws in the shape of martial law regulations which had no legal validity whatever.

From the foregoing considerations it becomes quite apparent, therefore, that though a magistrate's court is an inferior court over which the Supreme Court will always have jurisdiction and control, its

(53) Ibid, at p.805.

(54) Ibid, at p.557.

proceedings when it actually acted as a martial law court will be beyond the recognition of the Supreme Court. The so-called martial law courts were never recognised as courts at all nor proceedings before them considered as legal proceedings.

The question whether the Court has jurisdiction to issue writs to the military authorities acting under a proclamation of martial law was considered in an Irish case by a proclamation of 10 December, 1920, the Lord Lieutenant of Ireland placed certain counties to be under martial law. The military authorities declared the unauthorised carrying of arms to be punishable by death and also issued orders for the holding of military courts. The appellants, who were civilians, were tried by a military court on a charge of improperly carrying arms, were convicted and sentenced to death. The appellants, who were civilians, were tried by a military court on a charge of improperly carrying arms, convicted, and sentenced to death. The appellants applied in the Chancery Division for a writ of Prohibition against the military court, the Commander-in-Chief and the General Officer Commanding to prohibit them from proceeding further with the trial or from carrying into execution any judgment against them. Their contention was that the aforesaid court was illegal and had no jurisdiction to deal with the matter. J. Powell refused the application and the Court of Appeal in Ireland dismissed an appeal from his order.

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On an appeal to the House of Lords the decision centred round the

(55) In re Clifford v. O'Sullivan (1921) 2 A.C. 570.

technical scope of the writ of Prohibition to stay proceedings of a military tribunal. A writ of Prohibition is, as described by Viscount Cave, "a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior court from usurping a jurisdiction with which it was not legally vested, or in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction."⁽⁵⁶⁾

He, then, proceeded to consider whether the so-called military court whose proceedings were challenged as illegal could be deemed as a court or a legal tribunal in any legal sense of those terms. No such claim was, however, advanced on behalf of the military authorities. "It was not a court-martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the Proclamation,

(56) Ibid, at p.582. J. Willes in London Corpn. v. Cox, L.R.2 H.L. at p.254, and Lord Blackburn in Mackonochie v. Lord Penzance, 6 App. Cas. at p.443 supported this definition. They expressed the opinion that the writ should only issue to a court having some jurisdiction which it was attempting to exceed. In Reg. v. Local Govt. Board, 10 Q.B.D. at p.321, L. J. Brett^{L.J.} expressed the opinion that the Court should not be chary of granting prohibition, and that whenever the Legislature entrusts to any body of persons, other than the superior courts, the power of imposing an obligation upon individuals, the Court ought to control those powers if they attempt to go beyond the powers given to them by Act of Parliament. In Clifford and O'Sullivan no such powers, as was pointed out by Viscount Cave, had been entrusted to the so-called military court either by Parliament or by the common law.

and of advising him as to the manner in which he should deal with the offences; and its "sentences," if confirmed, will derive their force not from the decision of the military court but from the authority of the officer commanding His Majesty's forces in the field."⁽⁵⁷⁾

The House of Lords was, therefore, of the opinion that however wide a view might be taken of the power of the courts to grant prohibition, it would not lie in the present case. Moreover, there was the further difficulty caused by the fact that the officers constituting the so-called military court had long since completed their investigation and nothing remained to be done by them. The issue of a writ or prohibition directed to them would, therefore, be of no avail.

Where a prisoner was confined in a civil gaol under a warrant received from the military authority it was held that "the gaoler, as a civil servant of the law, has no right to hold a prisoner on the order of anybody except of a duly constituted civil officer of the Crown," and as he had no warrant from such officer he was not entitled to keep custody of the prisoner."⁽⁵⁸⁾

A letter to the applicant was opened by military press censors appointed under the authority of the General Officer commanding in Natal. He pressed for an assurance that this should not occur again. While J. Mason admitted the general principle that "under the post

(57) Ibid, at 581.

(58) Reinecke v. The Attorney-General (1902) 11 Shiel 565.

office and the general law, it was undoubtedly the duty of the Postmaster-General to have the letter in question delivered to the applicant, and neither he nor the press censors had under those laws, any right to deal otherwise with the letter, whatever may have been the motives and whoever may have professed to authorise the act, no absolute illegality can be defended on the plea of superior orders," he concluded that in the present case "the supervision of letters likely to contain such information which may reach the enemy seems on the fact of it not an unreasonable precaution." J. Mason⁵ however, did not think it advisable to decide upon affidavits such a controversial question whether any necessity for supervision existed or not.
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In Du Toit v. Marais certain livestock belonging to the plaintiff was seized by the military authority. The plaintiff subsequently followed the military column and was told by the officer in command that he could take back his stock or, if he were unable to find his stock, to take any other animals in charge of the force to make up the full number. Later on the plaintiff found some of his own stock in the possession of the defendant who also got back his stock from the military authority. The defendant had admitted to the plaintiff that he had more stock than originally belonged to him. The plaintiff

(59) W. B. Morcom v. The Postmaster General (1900) 21 National Law Report, 32.

(60) (1904) 13 The Cape Times Report 139.

sued the defendant for the return of his stock or their value. In holding that seizure by martial law did not change either the plaintiff's or the defendant's ownership in their property, J. Hopley J. said:

"This is a system which the civil law cannot possibly recognise, nor can we hold for one moment that such proceedings changed the dominion of the stock acquired by the military in this way. Stock taken from a suspected rebel remains his just the same as the stock taken from a loyalist remains his."⁽⁶¹⁾

5. The Abrogation of the Constitutional Guarantees

To what extent does a declaration of martial law abrogate the civil law and dispense with the restrictions imposed by the Constitution? Theoretically speaking, the laws are silent when martial law is enforced. They are, from their very nature and in essence, fundamentally opposed. Yet in almost all cases when martial law is in force the common law is not entirely superseded; both have co-existed - their respective jurisdictions being defined under the proclamation. Clashes were inevitable, for discretionary powers will inevitably be exceeded. But as the courts have shown an increasing awareness and a better understanding of the relation between judicial

(61) Ibid, 142.

control and executive or military action, such conflicts have been few and occasional. But the willingness of the judges to accommodate the appropriate authority in its onerous and responsible task of restoring peace and order does not mean that they have rushed to one extreme of upholding every unlawful order.

Martial law as such cannot be declared in England, but in the United States, where such declarations have not infrequently been made, the courts have been obliged to pronounce on the limits of the invasion upon the constitutional guarantees. (62) In discussing the effect of a declaration of martial law there Professor Willoughby has commented:

"There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military is substituted for civil law. So-called declarations of martial law are, indeed, often made, but the legal effect of these goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law." (63)

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In Ex parte Milligan the American Supreme Court discussed at

(62) We have discussed the American cases in Chapter 4.

(63) Willoughby, The Constitutional Law of the United States, Vol.II, at p.1234 (1910).

(64) (1866) 4 Wall 2.

length the claim of the armed forces to try an American citizen when the courts were peacefully transacting their business. To every person charged with crime the American Constitution guaranteed 'the inestimable privilege of trial by jury.' "This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or (65) political necessity." Justice Davies, who delivered the opinion of the court, could find no reason why the birthright of every American citizen accused of committing a crime to be tried and punished according to the law should be so readily interfered with when the courts in Indiana "needed no bayonets to protect it, and required no military aid to execute its judgments."

The enormity of the crime or the stupendous moral indignation against it is no justification for abolishing the normal judicial process. When it was conclusively proved that the judges who were commissioned during the Rebellion were eminently distinguished for patriotism and "were provided with juries, upright, intelligent, and selected by a marshal appointed by the President," it could be asserted that "the Government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment," specially because its records disclosed that it was constantly trying similar offences without any interruption. Justice Davies stated admirably the reasons

(65) Ibid.

why the law and not men should rule when there was no colossal civil commotion in the country:

"The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of the wicked rulers, or the clamour of an excited people. If there was law to justify the military trial, it is not our province to interfere; if there was not, it is our duty (66) to declare the nullity of the whole proceedings."

6. Interference with Personal Liberty

The propositions that martial law may lawfully be applied when overpowering necessity exists, and that the military authority has no right to interfere with the personal liberty of the citizens, are contradictory. From the very nature of the circumstances such interference may only be normally expected. "Indeed that some rights of liberty must be interfered with by military operations is as certain as that there must be interference with some rights of property. A

(66) Ibid.

commander must, for instance, have power to control the movements of non-combatants on the actual field of hostilities or on his line of communications: he must have power to control them in his camps or in the towns which he defends against the enemy.⁽⁶⁷⁾ Such interference finds support from the principle that "commission of an act otherwise tortious is justifiable if necessary for the public good."⁽⁶⁸⁾ Salus populi becomes the supreme law.

The appropriateness of any military measure affecting the personal liberty may, therefore, be assailed by questioning whether it was necessary, not by challenging the authority to do so.

It is not the power of control, but the power to punish, that has evoked so much criticism. "Temporary restraints upon person and property may be defended before the courts as necessary measures of prevention. Rather different, however, is punishment by military authority."⁽⁶⁹⁾ It would, then, be more relevant to inquire what measures of control will be deemed necessary and, therefore, lawful.

In the first instance the military authority will issue regulations which will generally limit the rights of assembly, movement and expression and gradually other restrictions. Exercise of their powers will start when violations of these regulations arise. Arrest and detention will mark the first steps and finally military courts will

(67) H. Erle Richards, Martial Law, 18 L.Quar.R. 133 at

(68) Fairman, Martial Rule (1929) 23 Ill.L.R. 766 at 776.

(69) Ibid, at 783.

be set up to try and punish offenders for breach of martial law regulations.

Cases will now be started in the civil courts either against such arrest and detention or trial and punishment. It will be up to the court, if still functioning, to decide whether it will interfere with the military acts. So far the preponderance of judicial opinion has, as already seen, been in favour of the principle of judicial non-intervention when actual war is raging. But when the existence of war is not so obvious or if no reasonable regulation between the particular measure and the necessity could be established, the court has shown a tendency to restrain such exercise of power. The two considerations before the Court have been clearly indicated in the following words:

"On the one hand lies that consideration for the individual that has dictated our bills of rights - fundamental rules to guarantee civil liberty and insure fair play in the exercise of governmental power ... It is no doubt wise, as it is lawful, that in time of overpowering necessity executive process should serve as a temporary substitute for judicial process. But the executive should be sure that it is indeed a crisis, and not merely an hallucination.

"There is a converse principle of policy: the public should not be exposed to the hazards of hair-breadth escapes merely to afford gratuitous opportunities to insurrectionists. It is not only a power

but a duty of the Governor to put down violence and enforce the law. To hit the precise line of conduct which necessity dictates may indeed be difficult ... Officers may have to act summarily and cannot be required to weigh their measures with that scrupulous nicety which is to be expected in a court of law. Situations must be viewed as they appeared at the moment, not in the light of the event."⁽⁷⁰⁾

To maintain the balance between the opposing considerations may indeed be difficult, but it is equally important to remember that the personal liberty which "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law"⁽⁷¹⁾ is a natural right of the subject and without cogent reason should never be abridged or trifled with. As Stephen said: "Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whenever he or his officers thought proper as in France was once daily practised by the Crown, there would be an end of all other rights and immunities."⁽⁷²⁾

(70) Charles Fairman, Martial Rule and the Suppression of Insurrection (1929) 23 ILLINOIS LAW REVIEW, at pp.787-8.

(71) Stephen, Commentaries on the Laws of England, Book 1, at p.143 (8th edition).

(72) Ibid.

7. Encroachments on Rights to Property

Does martial law require the supersession of the ordinary law of property? In order to be able to subdue rebellion or offer effective resistance to an enemy it is absolutely necessary that the armed forces should have the power to enter any premises or destroy or acquire any property. The reasons are quite obvious. "No military operations can be carried on unless the troops can enter on private property; can throw up entrenchments and construct other military works; can destroy houses or other structures which interfere with their action or afford assistance to that of the enemy."⁽⁷³⁾

It appears the maxim salus reipublicae suprema lex which requires the subordination of the rights of the individuals to the necessities of the State, would make such trespass lawful. Some of the few English precedents which considered the extent of military interference with the rights to property have laid down that no action for damage to property will lie against the military authority.

The acceptance of the principle that the commission of a tort may be justified did not only refer to cases arising in time of war when "a man may justify making fortifications on another's land without license"⁽⁷⁴⁾, but also to other cases "where it sounds for the public good."⁽⁷⁵⁾ Thus, houses may be pulled down to stop a fire, or

(73) H. Erle Richards, Martial Law, 18 Law Q.R. at p.134 (1902).

(74) Per J. Kingsmill J., 1 Dyer 36 b. (1537)

(75) Ibid.

goods may be cast overboard to save a ship or the lives of those on
(76)
board.

In an action for a nuisance arising from the burning of bricks on the defendant's own land lying adjacent to the plaintiff's dwelling-house, *J. Willes* considered the exceptions to the general liability for tortious acts:

"The common law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted, is subject to this qualification, that necessities may arise for an interference with that right pro bono publico, to this extent, that such interference be in respect of a matter essential to the business of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place."
(77)

J. Willes found analogies from two other examples which made lawful such acts as were done of necessity to avoid a greater harm:

"Every man has a right to enjoy his character untainted and uncontaminated by the breath of slander: but that right is subject to the rule as to privileged communications, which justifies and permits a reasonable publication of defamatory matter, even though it should amount to a charge of felony. So every man has a right to the

(76) Pollock's Law of Torts, 15th ed., p.121 (1951). "The maritime law of general average assumes, as its very foundation, that the destruction of property under such conditions of danger is justifiable."

(77) Hole v. Barlow (1858) 4 C.B.N.S. 334 at 345.

enjoyment of his land: but, in the event of a foreign invasion the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases, (78) private convenience must yield to public necessity."

That the rights and liberties of the subject could be lawfully subordinated to public necessity was also conceded by St. John, leading counsel for Hampden. Thus, he said: "My Lords, in these times of war I shall admit not only His Majesty but likewise every man that hath power in his hands may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety of the (79) kingdom without respect had to any man's property."

Such property as may be taken for the necessary defence and safety of the country cannot be converted to any other use excepting that for the defence purposes. In the Case of the King's Prerogative (80) in Saltpetre the judges were of the opinion that "when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Ed. IV. 23. And in such case or

(78) Ibid.

(79) R. v. Hampden (1637) 3 St. Tr. 825.

(80) (1607) 12 Co. Rep. 12: 77 Eng. Rep. 1294.

such extremity they may dig for gravel for the making of bulwarks:
for this is for the public, and every one hath benefit by it ...

And in this case the rule is true Princeps et respublica ex justa
(81)
causa possunt rem meam auferre."

With the recognition of the supreme necessity the judges did
not, however, lose sight of the principle that "after the danger is
over, the trenches and bulwarks ought to be removed, so that the owner
shall not have prejudice in his inheritance."
(82)

Where law gives no remedy to persons who suffer, they are left
without any choice. "There are many cases in which individuals sustain
an injury for which the law gives no action: for instance, pulling
down houses or raising bulwarks for the preservation and defence of
the kingdom against the King's enemies."
(83)
Here, the court was considering whether the acts of commissioners appointed under a Paving
Act causing damage to an individual made them liable to action. If
they did not exceed their jurisdiction and the Act did not provide for
satisfaction to those who might suffer, judicial intervention was
most unlikely. Thus Lord ^{C.J.} O. J. Kenyon/said:

"If the Legislature think it necessary, as they do in many
cases, they enable the commissioners to award satisfaction to the
individuals who happen to suffer; but if there be no such power, the

(81) Ibid, at 1295.

(82) Ibid.

(83) The Governor & Co. of the British Cast Plate Mnfg. (1792)
4 T.R. 794 at 979, per J. Buller J.

parties are without remedy, provided the commissioners do not exceed their jurisdiction: but it does not seem to me that the commissioners acting under this Act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these Acts of Parliament; but the interests of individuals must give way to the (84) accommodation of the public."

Common sense also dictates that in time of war the protection of (85) private property will in practice be impossible. It is not so much the difficulty of enforcing the law which is conclusive against the existence of a remedy, "but it is an argument of a practical kind in favour of the (86) rule enunciated" in the cases we have so far considered. Such practical considerations, therefore, have led the judges to hold that in time of war rights of property may lawfully be infringed and no action will lie against the authority.

(84) Ibid, at p.796.

(85) "Assume that an owner applied to the High Court for protection against a threatened trespass on his property by the military for the purpose of their operations. On what grounds could the Court refuse relief in such a case if the acts complained of were without doubt illegal? It is certain that no Court could hamper the action of the military in their actual conduct of operations, but to refuse an injunction in such a case would of itself be an acquiescence in the suspension of the law."

H. Erle Richards, Martial Law, 18 L.Q.R. 133.

(86) Ibid.

CHAPTER 8THE JUDICIAL REVIEW OF WAR POWERS1. The Scope of the War Power

The relation between the exercise of governmental powers during war and the constitutional guarantees has been the subject-matter for dispute from early times. The true understanding of the relationship was nicely brought out in the 'homespun metaphor' used by President Lincoln: "By general law, life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given
(1)
to save a limb."

War is admittedly a supreme national crisis. As in other crises, so also during the unusual circumstances of war men are naturally inclined to ignore law and reason and act on first impulses. What seemed to them normal and indispensable during peace time now appears unpracticable. The result may be confusion. The types of criticism which are usually made with respect to the exercise of war powers and its constitutionality have been referred to by Mr. C. E. Hughes, as he then was. "Some altogether misconceive the constitution. Others vaguely fear that we are serving temporary exigency at the expense of our fundamental law, and that we are thus breeding a lawless constitution - ignoring its spirit which is a serious menace to our

(1) Charles Fairman, The Law of Martial Rule and the National Emergency, 55 Har. Law Review, 1278 (1942).

future. Others seek to raise doubts of power in order to embarrass the prosecution of the war. And there seem to be still others who in their zeal impatiently and without thought put the constitution aside as having no relation to these times." None of them truly reflect the real position. Whenever there is a need to consider war powers under the constitution, the true interpretation would seem to be as stated by Mr. Hughes:

"While we are at war, we are not in revolution. We are making war as a Nation organised under the Constitution from which the established national authorities derive all their powers either in war or in peace. The Constitution is as effective today as it ever was and the oath to support it is as binding. But the framers of the Constitution did not contrive an imposing spectacle of impotency."

What is actually meant by the war powers of the Government? Again, according to Mr. Hughes, the war power of the national government is "the power to wage war successfully." The comprehensive nature of this power has been stated by ^{C.J.} Stone of the United States Supreme Court in the following words:

"It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not

(2) C. E. Hughes, War Powers Under the Constitution (1917). Report of the American Bar Association, Vol. 42, at p.232.

(3) Ibid, at p.232.

(4) Ibid, at p.239.

restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defence, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war."⁽⁵⁾

In both the U.S.A. and England the legislature has the power to enact war laws conferring on the Executive all necessary powers for the successful prosecution of the conflict. Though the powers of Congress are defined by the Constitution, the war time experience of the Nation was sufficient to settle the Court's practice. It realised that when a nation is in the grip of a war and fighting for its very existence, it is futile to proceed to restrain the legislative authority. "The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened."⁽⁶⁾ In England though laws enacted by Parliament cannot be declared ultra vires, yet the regulations made thereunder were challenged before the courts as unconstitutional. In interpreting the scope of these regulations the courts of England, as we shall see, adopted a different view during⁽⁷⁾ the Second World War than that in the First World War. They went even

(5) Hirabayashi v. U.S. (1943) 320 U.S. 81 at p.93.

(6) Hamilton, The Federalist, No. 26.

(7) "The English Courts have gone further in sustaining Executive action during the Second World War than they did in the earlier conflict." Bernard Schwartz, Law and the Executive in Britain, at p.327.

further than the courts in U.S.A. in according judicial approval of
 the exercise of all necessary powers by the Executive. (8)

Another principle which is to be remembered in reconciling
 constitutional guarantees with the overriding war powers is that the
 constitution is not self-destructive. (9) In discussing the proposition
 that the constitution does not conflict with itself by conferring
 powers on the one hand and taking them away on the other, Mr. Hughes
 said:

" ... The power has been expressly given to Congress to prosecute
 war, and to pass all laws which shall be necessary and proper for
 carrying that power into execution. That power explicitly conferred
 and absolutely essential to the safety of the Nation is not destroyed
 or impaired by any later provision of the Constitution, or by any one

- (8) Bernard Schwartz, Law and the Executive in Britain (1949) at p.349. "The lessons of American history are even more significant in disproving the thesis that freedom from all judicial control is essential to the effective waging of war. Whenever the existence of the nation has been at stake - from the struggle for independence to the last conflict - virtually unlimited powers to preserve it have been assumed. Yet at no time has it been thought necessary to subscribe to a doctrine such as that articulated by the House of Lords in Liversidge v. Anderson." (1942) A.C. 206.
- (9) In Billings v. U.S. (1913) 232 U.S. 261 at p.282, Chief Justice White of the U.S. Supreme Court, while considering whether the taxing power granted expressly by the Constitution was taken away by the due process clause of the Fifth Amendment, said: "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the power which it confers on the one hand it does not immediately take away on the other ...".

of the amendments. These may all be construed so as to avoid making the Constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties."⁽¹⁰⁾

Without taking too extreme a view of the court's approach in solving the seeming conflict between the exercise of executive powers during war and the claims to fundamental liberties of the citizen, it may be said that the paramount consideration before the court has always been that the war measures must be successful. "Defence measures will not, and often should not, be held within the limits that bind civil authority in peace."⁽¹¹⁾ For, as J. Douglas quite aptly said, "peacetime procedures do not necessarily fit wartime needs."⁽¹²⁾ Frankly speaking, some interference with the enjoyment of rights and liberties protected by the constitution is inevitable. "However precious the liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement."⁽¹³⁾

But, at the same time, while conceding the supremacy of war measures and military judgment, it has also been felt that such measures must be "used only in the most extreme circumstances ...

(10) C. E. Hughes, War Powers Under the Constitution (1917). Report of the American Bar Association, Vol. 42, at p.238.

(11) Korematsu v. U.S. (1944) 323 U.S. 214 at p.244.

(12) Hirabayashi v. U.S. (1942) 320 U.S. at 106.

(13) Rex v. Halliday (1917) A.C. 269 at p.271.

(14)
There must be a careful balancing of interests."

(15)
In Korematsu v. U.S. J. Frankfurter of the American Supreme Court considered at length the relation between war powers and the constitutional limitations. He dismissed as unrealistic the idea which attributed illegality to a war measure judging it by peace time standards. "The validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless." One cannot just say that when the armed forces are exercising powers allowable by war needs, they are resorting to unconstitutional methods. That would "suffuse a part of the Constitution with an atmosphere of unconstitutionality." (17)
Within their respective spheres of action, which are, of course, very different, both the judges and the military authorities are functioning within the limits imposed by the Constitution. "Military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs." (18)
The Constitution is not an instrument for "dialectic subtleties", so that one could recognise that reasonable military precautions in time of war were absolutely essential and at the same time deny them legal validity. "If a military order such as

(14) Duncan v. Kahanamoku (1945) 327 U.S. 314 at p.335, per Justice Murphy.

(15) (1944) 323 U.S. 214.

(16) Ibid, at p.224. "The armed services must protect a society, not merely its Constitution ... Defence measures will not, and often should not, be held within the limits that bind civil authority in peace." Per J. Jackson at 244.

(17) Ibid, at p.224.

(18) Ibid, at p.224.

that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorised action by the Interstate Commerce Commission (19) within the limits of the constitutional power to regulate commerce."

In the same case J. Jackson expressed the opinion that "it would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform (20) to conventional tests of constitutionality." But he, for that reason, found no justification to "distort the Constitution to approve all that (21) the military may deem expedient." The armed forces are merely carrying out a defence programme. "He is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional (22) law."

Like other problems created by war, the judicial problem is also no less baffling, since the task of reconciling the conflicting claims made simultaneously on behalf of the authority and the subjects is not so simple and easy. The nature of the judicial reasoning can become hardly more delicate, because whatever solution they have to offer must antagonise neither the one nor the other. With the necessity

(19) Ibid, at p.225.
 (20) Ibid, at p.244.
 (21) Ibid, at p.244.
 (22) Ibid, at p.244.

to realise and fulfil the natural expectations of both, the Court is handicapped by its own inexperience as to what is actually necessary for defence purposes and what is merely redundant and superfluous. As on the one hand they must be guided by the eternal wisdom embodied in the Latin maxim, Salus populi est suprema lex, so also on the other hand they cannot afford to forget the classic utterance of Justice Davies in the Milligan case:

"No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (the U.S. Constitution) provisions can be suspended during any of the great exigencies of Government. Such a doctrine tends directly to anarchy and despotism ... " (23)

Though the judges when deciding cases arising in emergency or war have always had the consciousness that "if hard cases make bad (24) law, emergencies may make worse," the present-day concern of the judges is to strike a balance between these two extremes. As we shall presently see that there have been differences of opinion among the English and American judges as to their power to review the executive action during war, it can also be fairly said that all of them have shown their understanding of the relative values of conceding essential powers to the executive and military authority and upholding the liberties of the subjects whenever they can. Justice Rutledge of the U.S. Supreme Court

(23) Ex parte Milligan (1866) 4 Wall (U.S.) 120.

(24) Sir Cecil T. Carr, Concerning English Administrative Law (1941) p.65.

has remarkably summed up the modern judicial attitude:

"War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be impaired. But it does not suspend the judicial duty to guard whatever liberties will not imperil the (25) paramount national interest."

2. Judicial Review of Action Taken under the War Power

If such be the nature of the war power it becomes obvious that all other governmental agencies, including the judiciary, will of necessity be subordinated to military demands, at least so long as the emergency lasts. For our purposes it is important to know whether the courts are actually rendered powerless by war-time legislations or whether the limitations on their power to review and control are merely self-imposed, their guiding principle being the consciousness of the fact of war.

As the legislative authority is supereme in England, Parliament

(25) Yakus v. U.S. (1943) 321 U.S. 414 at p.461.

can at any time preclude the court's jurisdiction on any matter whatsoever. It will, however, be within the jurisdiction of the court to decide whether it has done so by any particular legislation. In the United States of America Congress has to reckon with a written constitution defining the powers of the three governmental organs and declaring the fundamental rights of citizens. If, therefore, any Federal legislation disregards any constitutional provisions the Court may declare such Act ultra vires. Congress has no power to oust the Court's jurisdiction. The limitations upon the reviewing power of the courts are in America imposed by themselves. No outside authority can ever order them not to interfere with any executive action or legislative measure. But, as has been aptly said, "it is the courts in Britain, no less than in this country (U.S.A.) that are the ultimate judges of the extent of their authority on review."⁽²⁶⁾

It may be mentioned that the courts in England may declare any regulation or executive action as ultra vires as being in excess of the powers granted by a statute or common law.

In interpreting war-time legislations and regulations made thereunder, several questions relating to judicial power to review and control have been raised and considered. In the first place it has been asked whether the courts should adopt a different attitude from that followed in peacetime in construing such Acts and regulations.

(26) Bernard Schwartz, Law and the Executive in Britain, p.165.

The very fact that the nation has become involved in war obviously creates a bias in the judicial mind. The whole approach is marked by the consideration "it is important to have in mind that the regulation in question is a war measure."⁽²⁷⁾

(28)

Similarly, in Rex v. Halliday, ex parte Zadig, Lord Finlay, L.C., in holding that regulation 14 B of the Defence of the Realm Regulations was a proper exercise of the power conferred, said:

"The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munitions works, bridges, etc., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases."⁽²⁹⁾

Though expediency or practical considerations may weaken the presumption in favour of the liberty of the subject, it has been emphatically asserted that the fact of war cannot make any difference in the judicial approach in interpreting such regulations. "This is not to say that the courts ought to adopt in war-time canons of constructions different from those which they follow in peacetime. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed,

(27) Per Lord Macmillan in Liversidge v. Anderson (1942) A.C. 206 at p.251.

(28) (1917) A.C.269.

(29) Ibid, at p.270.

especially in a matter so fundamental as the liberty of the subject -
 rather the contrary."⁽³⁰⁾

The position may, however, be differently stated. It may be that the courts will maintain the same attitude in interpreting the disputed regulations issued under war-time legislations, but it is possible that words and expressions used in them will assume an altogether new meaning under the stress of 'total war.' It is within common experience that men in their everyday life shift emphasis to mark their behaviour in the light of the changing circumstances. When a supreme national emergency places the life of a nation in jeopardy "it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peace time measure."⁽³¹⁾ The court should also consider the objects for which a particular Act is passed and its interpretation should facilitate and not frustrate such objects. Referring to the need to interpret regulation 18 B of the Defence (General) Regulations, 1939,

(30) Liversidge v. Anderson (1942) A.C.206 at 251, per Lord Macmillan.

(31) Ibid. So also Lord Romer said: "We are dealing here with an Act passed and regulations were made under it in times of a great national emergency, and in view of this circumstance and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country ... The context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, and this is the case here." Pp.280-1.

without losing sight of the purpose for which it was issued, Lord Macmillan said:

"The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war (32) time."

Lord Atkin, in delivering a dissenting judgment, was not prepared to concede any latitude in interpreting a statute or regulation by reason of the existence of war. "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak (33) (34) the same language in war as in peace." In Rex v. Halliday, Lord Shaw of Dunfermline, who dissented from the majority opinion, also uttered the same warning when he said that if the executive found it convenient to seek refuge to the device of orders-in-council and the judiciary "approach any such action of the government in a spirit of complaine rather than of independent scrutiny" there would lie grave constitutional (35) and public danger. Such views are no doubt inspired from the highest motives but they are, it may be submitted, too strict and therefore extreme.

(32) Ibid, at p.251.

(33) Ibid, at p.244.

(34) (1917) A.C. 260.

(35) Ibid, at p.286.

Whether it is due to imperceptible change in the judicial sense of values or in the very meaning of words under the stress of war, it is undeniably true that war time legislation will receive favoured treatment and no secret was made of this fact. "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely (36) national success in war, or escape from national plunder or enslavement." The same consideration impelled Lord Macmillan to say in Liversidge's case that "at a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause, it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild (37) precaution of detention."

It will, however, be a mistake to suppose that it is only the courts which have taken this attitude. The people generally had sufficient common sense to realise the "obvious fact that sacrifices and inconveniences which would be intolerable in peace are not only (38) justifiable but imperative in war" and they were sacrificing their

(36) Ibid, at p.271, per Lord Atkinson.

(37) (1942) A.C. at p.257. In Bowles v. Willingham (1943) 321 U.S. 503 at 519-20, Justice Douglas expressed similar sentiments when he said: "A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a fair return on his property."

(38) C. K. Allen, Law and Orders (1956), p.54.

liberty for extraordinary purposes. Such willing submission on the part of the civil population must not be supposed to have established the legality of all measures adopted in war time. Lord Sumner's vision was clear enough to focus attention on the relation between the war psychology of the people and the war measures:

"Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right ... " (39)

Other questions relating to judicial review and control of war legislations and whether it was not unrealistic when the country is in the grip of war for the court to be allowed to interfere with executive or military measures, and whether the court is in a position to judge of the actual necessity of those measures.

During the First World War regulation 14B of the Defence of the Realm Regulations, 1914, authorised the Secretary of State to intern any person "of hostile origin or associations," if on the recommendation of a competent naval or military authority it appeared to him necessary for securing the public safety or defence of the realm. In Rex v.

(39) Attorney-General v. De Keyser's Royal Hotel (1920) A.C. at p.563.

(40)
Halliday the petitioner, a naturalised British subject of German birth, was detained by an order made under regulation 14B. In moving an application for a writ of habeas corpus his counsel argued that Parliament had not conferred the authority to make such an order. The question before the court was not one of power but of interpretation. "The power of Parliament to authorise such a proceeding was not and could not be disputed. The only question is as to the construction of the Act." (41) We already have seen the reasons for a uniform rule of construction and Lord Atkinson expressed his inability to appreciate why statutes which infringe the liberty of the subject should be construed in one manner and statutes not so infringing in a different manner. Words must have the same meaning everywhere. He said: "I think the tribunal whose duty it is to interpret a statute of the one class or the other should endeavour to find out what, according to the well-known rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it. That (42) is wholly a different matter."

(40) (1917) A.C. 260.

(41) Ibid, at p.268.

(42) Ibid, at p.274.

Be that as it may, regulation 14B imposed two limitations. First, the regulation could subsist only during the war. Secondly, it could be used for the purpose of securing the public safety and the defence of the realm. It was contended that if in pursuance of the regulation it was thought necessary to impose any restraint on the freedom of individuals supposed to help the enemy, previous judicial inquiry must be held in order to justify such measure. Lord Finlay, L.C., in rejecting the proposition that executive action could be subjected to judicial control, said: "It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law."⁽⁴³⁾

Referring to the second limitation which, as a legal limitation, seemed illusory to Lord Shaw of Dunfermline, the learned judge asked: "But who is to judge of that purpose? As to what acts of state ~~are~~ are promotive or regardful of that purpose, can a court of law arrest the hand of a responsible Executive?" Though he could imagine extreme cases in which personal caprice and not public considerations would be dominant, he was no less certain that "in everything, from the lighting of a room to the devastation of a province, no court of law could dare to set up its judgment on the merits of an issue - a public and political issue - of safety or defence."⁽⁴⁴⁾

(43) Ibid, at p.269.

(44) Ibid, at p.288.

In spite of such expression of noble and democratic sentiments the judicial attitude would perhaps be fairly balanced between the competing claims of the subject and the State when war was raging. As E. J. Scrutton^{L.J.} remarked: "It has been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta."⁽⁴⁵⁾

Before we proceed to consider in detail the facts and decisions thereon in cases arising out of emergency legislations and orders made during the two World Wars, it may be mentioned that, broadly speaking, the constitutional problems to decide upon the limits of authority delegated to the Executive are less acute in England than in the United States. It need not be emphasised that "the established supremacy of Parliament enables it to take any measures it deems necessary to cope with the emergency," and "whatever powers Parliament itself possesses it may confer upon others."⁽⁴⁶⁾ The courts in England cannot control delegation, they can only ensure that the delegate does not exceed the authority conferred on him. But even here "as the powers delegated, under the stress of total war, have become more sweeping, with fewer restrictions imposed upon Executive discretion, the judicial power to declare Executive action ultra vires of the enabling legislation has become of less importance."⁽⁴⁷⁾

(45) Ronnfeldt v. Phillips (1918) 35 Times L.R. 46 at p.47.

(46) B. Schwartz, Law and the Executive in Britain, p.314.

(47) Ibid.

While in the United States, on the other hand, in the words of Justice Burton, "the outer limits of the jurisdiction of our military authorities is subject to review by our courts even under such extreme circumstances as those of the battle field." But as he was dissenting from the view of the majority on the desirability of judicial control of the Executive action, he did not fail to pronounce the following caution. Referring to the necessity of judicial review of such action, Justice Burton said:

"This, however, requires the courts to put themselves as nearly as possible in the place of those who had the constitutional responsibility for immediate executive action. For a court to re-create a complete picture of the emergency is impossible. That impossibility demonstrates the need for a zone of executive discretion within which courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."⁽⁴⁸⁾

3. Limitations on the Exercise of Administrative Powers During First World War

As the statutes enacted by Parliament and their judicial interpretation during the Second World War differed from those in the earlier conflict, we shall separately consider them. In spite of the differences,

(48) Duncan v. Kahanamoku (1945) 327 U.S. 342-3.

however, both periods show and record the judicial tendency to support the executive action taken bona fide to secure the public safety and the defence of the realm.

(49)

What Lord Atkinson said in Rex v. Halliday with respect to the Defence of the Realm (Consolidation) Act, 1914, and the regulations made thereunder is equally applicable to all war legislations and orders issued in pursuance thereof. Two conditions must be fulfilled before any subordinate legislation or orders made during war emergency could be sustained as legal and intra vires in a court of law. "First, the regulations can only be issued during the war, and second, whatever they purport to do must be done for the purpose of securing the public safety and the defence of the realm. It is by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void." (50)

Apart from these considerations, the reason why the judges were inclined to uphold executive action during the war crisis are discernible from the following statement of Lord Parker in the Zamora case:

"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence

(49) (1917) A.C. 260.

(50) Ibid, at p.272.

(51)
in a court of law or otherwise discussed in public."

In spite of this clear statement of the principle that if the Executive is entrusted with the duty of making regulations for the national security, the judges should not proceed to determine the question whether such regulations have or have not the tendency to promote the public safety and the defence of the realm, the courts, during the first World War, generally acted on the assumption that if in their opinion "a regulation upon the face of it could not possibly aid in securing the public safety or the defence of the realm" they had the power to hold such a regulation as exceeding the legislative territory assigned by the Act to the Executive.

It is obvious that the action of the military authority will range over a variety of subjects when war is on, but it is not always clear which action may or may not have any reasonable relation to war efforts. Thus, persons suspected of acting, or of having acted, or of being about to act in a manner prejudicial to the public safety may be prohibited from residing in any locality if the military authority has an honest suspicion with regard to such persons. (52)

Again, an exercise of powers under 2B of the Defence of the Realm Regulations, 1914, for the purpose of procuring a substantial quantity of a necessary supply (e.g. raspberries) for the use of troops is an exercise of the powers for securing the public safety and defence of

(51) (1916)2A.C. 77 at p.107.

(52) Rex v. Denison (1916) 32 T.L.R. 528.

(53) the realm. In Ronnfeldt v. Phillips and Others (54) the plaintiff claimed a declaration that the order directing him to leave the area where he was residing was ultra vires and void and asked for an injunction to restrain the defendants from preventing him from returning there. The order was made on the allegation that he made certain remarks showing disloyalty to the British Crown. Such remarks as the plaintiff made could not, it was submitted, be prejudicial to the public safety. Moreover, the regulation dealt with persons who were suspected of acting to the prejudice of the successful prosecution of the war and did not apply to persons who had only expressed disloyal sentiments. L. J. Bankes^{L.J.} was unable to accept the argument. He said: "It used a general expression which would include language as well as acts. The present was a case in which language was relied on. The language which was attributed to the appellant was such that he might reasonably be suspected of acting in a manner prejudicial to the public safety." (55) (56) If suspicion was honestly entertained, it need not be reasonable.

It was also held that a regulation which prohibited a person who was not a natural-born British subject from using a name other than that by which he was ordinarily known at the commencement of the war was not ultra vires, although it discriminated between naturalised (57) and natural-born British subjects. The urgent national necessity caused

(53) Lipton, Ltd. v. Ford (1917) 2 K.B. 647.

(54) (1918) 35 T.L.R. 46.

(55) Ibid, at p.49.

(56) Ibid.

(57) Ernest v. Commissioner of Metropolitan Police (1919) 35 T.L.R. 512.

(58)
by war also justified the requisition of a ship. A regulation which, upon the face of it, does not secure the public safety or the defence of the realm is, it was asserted, outside the authority of the enabling Act, but it was held that the regulations 39BBB(1) and 39DD made under the provisions of the Defence of the Realm (Consolidation) Act, 1914, which empowered the Shipping Controller to give directions as to the use of British ships and to prohibit any ship from going to sea without a previous licence from him were not ultra vires. J. Greer said:

"To give to a Minister of the Crown who is appointed to control and regulate shipping, power to direct where a ship is to go, and what cargo she is to load, whether it be raw material of industry or food for the population, is obviously a measure which may usefully help in securing the safety of the public in a time of scarcity caused by war, and may assist in the defence of the realm by enabling the country to obtain a sufficient stock of food to provide stamina for the ~~xxxx~~ troops and to maintain and hearten the civil population."
(59)

(58) Hudson's Bay Co. v. MacLay (1920) 36 T.L.R. 469.

(59) Ibid, at p.476. Regulation 39BBB(1) provided as follows:

"The Shipping Controller may make orders regulating, restricting, or giving directions with respect to the nature of the trades in which ships are to be employed, the traffic to be carried therein, and the terms and conditions on which the traffic is to be carried, the ports at which cargo is to be loaded or discharged ... "
Regulation 39DD(1) provided that "Except under and in pursuance of a licence granted by the Shipping Controller no British ship registered in the United Kingdom shall proceed to sea on any voyage whatsoever ... "

(60)

But, in China Mutual Steam Navigation Co. v. Maclay, the contention of the plaintiffs that the Shipping Controller had no power, under regulation 39BBB, to requisition the owner's services, was sustained, though the Court rejected the other contention that the Shipping Controller had no power to requisition the ships. The order of the Shipping Controller laid down a scheme for working the plaintiff's fleet. It had not only requisitioned the ships and the profits but also the owners' services. On a close scrutiny of the regulations J. Bailhache came to the conclusion that it did not contain the power to requisition the services of the owners.

(61)

In Attorney-General v. Wilts United Dairies the Food Controller entered into agreements with the respondents by which the latter were permitted to purchase milk within certain defined areas on terms that they should pay the sum of two pence per gallon for the privilege. The action was brought to recover the sums so payable. The respondents denied that the Food Controller had the power to impose such conditions.

The Attorney-General urged the extreme difficulty of the situation caused by war, the necessary steps to be taken to ensure the continued supply of milk and the importance of allowing freedom to the officials to "act under the powers conferred upon them without the fear of technical and vexatious objections being taken to the powers which they used." There were only two sources from which those powers were

(60) (1918) 1 K.B. 33.

(61) (1922) 91 L.J.K.B. 897.

derived, one of them was the Act creating the Ministry and the other the Regulations under the Defence of the Realm Act. The House of Lords held that neither of them directly or by inference enabled the Food Controller to levy the payment of any sums of money from any of the subjects.

Lord Buckmaster, in referring to the arguments pressed by the Attorney-General, said:

"All that may be readily accepted, but it cannot possibly give to any official a right to act outside the law; nor can the law be unreasonably strained in order to legalise that which it might be perfectly reasonable should be done if in fact it was unauthorised." (62)

He said that if in times of great national crisis more powers were required for maintaining both economic and military integrity of the country, the Executive could always ask Parliament, which was in continuous session, to grant the necessary powers.

(63)

Chester v. Bateson furnishes an interesting example of how an attempt by the Executive to oust the jurisdiction of the courts was frustrated, not only because the regulation exceeded the limits of delegated power but also on the ground that there was no reasonable basis for the Executive's action. Regulation 2A(2), which empowered the Minister of Munitions to declare an area where war production was

(62) Ibid, at pp.899-900.

(63) (1920) 1 K.B. 829.

carried on to be a special area, provided: "Whilst the order remains in force no person shall, without the consent of the Minister of Munitions, take, or cause to be taken, any proceedings for the purpose of obtaining an order or decree, for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house or other premises situate in the special area ... If any person acts in contravention of this regulation he shall be guilty of a summary offence against these regulations." The authority to make this regulation was derived from sub-section 1(e) of section 1 of the Defence of the Realm (Consolidation) Act, 1914.

The appellant contended that the regulation was bad in so far as an Executive order taken thereunder deprived a citizen of the right of access to the court. It also violated the provisions of Magna Carta which provided: "To no one will we sell, to no one will we refuse or delay right of justice." The Divisional Court invalidated the regulation on the basis of the judicial conclusion that it was not "a necessary, or even reasonable way to aid in securing the Public Safety and the defence of the realm." The enabling statute could not have gone so far in the present case, though the Court recognised that Parliament could enact such a law. As J. Darling said:

"This might, of course, legally be done by Act of Parliament; but I think this extreme disability can be inflicted only by direct enactment of the Legislature itself, and that so grave an invasion of the rights of all subjects was not intended by the Legislature to

be accomplished by a departmental order such as this one of the
 (64)
 Minister of Munitions."

J. Ivory was, however, ready to recognise that the purpose behind the regulation might be reasonable in so far as it aimed to prevent the disturbance of munition workers, provided that no order for ejectment was made except under the conditions laid down in the regulation. But he considered that the objection to the regulation was rightly made, because "it deprives the King's subjects of their right of access to the Courts of Justice and renders them liable to punishment if they have the temerity to ask for justice in any of the
 (65)
 King's courts." In his opinion there was nothing in the statute which authorised a regulation having such a result. "Nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorise or
 (66)
 justify it."

(64) Ibid, at p.833. As Allen has pointed out, "We seem here to be on the edge of a judicial pronouncement that there are certain fundamental rights which legislation cannot diminish - the American rather than the British doctrine. The decision has been criticised by those who think that a regulation for housing munition workers was sufficiently connected with the national defence to be within the powers of the enabling statute; if so, it did not matter whether the provision was in a statute or a regulation; the regulation, if intra vires, would have the same strength as the statute, and the order, if properly made under the regulation, would be valid."
Law and Orders, 1956, at p.87.

(65) Ibid, at p.836.

(66) Ibid, at p.836.

J. Darling referred to the circumstances when Parliament restricted the citizen's right to resort to a court of law for vindication of a wrong, as under the Vexatious Actions Act, 1896, but even here it would be seen that Parliament did not completely bar the institution of suits by persons mentioned therein. In a case involving the interpretation of the statute, J. Scrutton said:

"One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

(67) It provided: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the court, and that there is prima facie ground for such proceeding."

(68) In re Boaler (1915) 1 K.B. 21.

(69) Ibid, at p.36.

As the Defence of the Realm Act, 1914, did not contemplate disallowing a right of action by the subject, or at least the language employed therein did not make an explicit reference to such a restriction, the principle enunciated by *J. Scrutton* was applicable. *J. Darling* said:

"It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so render the seeker after justice liable to imprisonment and fine."⁽⁷⁰⁾

Though he appreciated that in stress of war citizens should not only be rightly obliged but also be ready to forgo much of their liberty, at the same time he felt that "this elemental right of the subjects of the British Crown cannot be thus easily taken from them."⁽⁷¹⁾

It appears that, in so far as the decision dealt with that aspect of the regulation which debarred the subjects of their right of access to the court, it was correct, but when the court did not find any reasonable relation between the housing of munition workers and the war effort it was surely mistaken.

As Bernard Schwartz has put it, "the importance of Chester v.

(70) Chester v. Bateson, at p.834.

(71) Ibid, at p.834.

Bateson lies not in its immediate holding, however, but in its indication of the zealousness of the English courts during the First World War to protect the rights of the subject, even during the stress of the war emergency."⁽⁷²⁾

(73)

In Newcastle Breweries Ltd. v. The King, the appellant, from whom a quantity of rum was requisitioned by the Admiralty, purporting to act under regulation 2B of the Defence of the Realm Regulations, 1914, claimed the market value of the rum and contended that in the absence of any agreement the market value should be determined by a court of law. The regulation provided that the price of any article requisitioned, if not agreed, should be determined by the War Losses Commission. The price to be fixed by the Commission was based on cost and reasonable profit, not on the fair market value. The regulation was, in so far as it purported to deprive persons of their right to the fair market value and to a judicial determination of the amount, held ultra vires. J. Salter said: "I do not think that a Regulation which takes away the subject's right to a judicial decision, or transfers the adjudication of his claim, without his consent, from a court of law to named arbitrators, could fairly be held to be a Regulation for securing the public safety and the defence of the realm, or a Regulation designed to prevent the successful prosecution of the war being endangered, within the meaning of these words in the Defence of the

(72) Bernard Schwartz, Law and the Executive in Britain, 1949, at p.320

(73) (1920) 1 K.B. 854.

(74)
 Realm (Consolidation) Act, 1914."

(75)
 In Hudson's Bay Co. v. Maclay, J. Greer^J, while expressing his disagreement with the above decision in so far as it involved the proposition that the King in Council had no power to acquire necessary stores at less than current market price or at a price to be fixed by a board of arbitrators, said that the Regulation did not debar access to the courts: "Whether the price was fixed by agreement or by the Losses Commission, the person whose goods have been taken can, in my opinion, sue for the price."
 (76)

We have so far discussed some of the cases involving interpretation of the war legislations during the First World War and also seen the assertion of great constitutional principles. Though they will remain as "examples of the preservations of the true functions of our courts even in time of great emergency," they were hardly followed in the Second World War. On the whole, however, the courts took a lenient view of executive action both in 1914 and 1939. "It was not doubted - nor, indeed, can it be doubted by sensible persons - that if the law allows room for a court to 'lean,' in time of national danger it will instinctively and properly lean toward public security. The more important thing is that it should not lean until it topples over."
 (77)

(74) Ibid, at p.865.

(75) (1920) 36 T.L.R. 469.

(76) Ibid, at p.478.

(77) Sir C. K. Allen, Law and Orders (1956) at p.44.

4. The Exercise of the Royal Prerogative during War

To attempt a discussion on the nature and extent of the royal prerogative is beyond the scope of our subject. We shall consider only how far it could be successfully exercised for the purposes of the defence of the country. (78) Before that, one may have to confront the inquiry what is meant by the prerogative.

Briefly speaking, the prerogative is, as defined by a learned constitutional writer, "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." (79) The prerogative is no doubt part of the common law of England. (80)

Some distinction has been tried to be drawn between the ordinary and the absolute prerogative. The ordinary prerogative means "those royal functions which could only be exercised in defined ways and involved no element of royal discretion" and by the absolute prerogative is meant "those powers which the King could exercise in his discretion." (81) An instance of the former is the appointment of judges, for the King could not himself dispense justice. The absolute prerogative covers the exercise of extraordinary powers to meet emergencies.

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- (78) Halsbury's Laws of England, VOL.VII, 3rd ed., pp.221. Chitty's Prerogative of the Crown and John Allen's Inquiry into the Rise and Fall of the Royal Prerogative, 1849, contain general discussion on the extent and limits of the various Royal prerogatives.
- (79) A. V. Dicey, The Law of the Constitution (1959) 10th ed., p.424.
- (80) Per Cozens-Hardy M.R. in In re a Petition of Right (1915) 3 K.B. 649 at p.659.
- (81) Wade and Phillips, Constitutional Law (1955) 4th ed. at pp.130-31.

There have been great controversies in the past as to how far the King's prerogative could be exercised in times of emergency and though the decisions of the courts went always in favour of the Crown, the exercise of arbitrary power by the King was eventually declared (82) illegal by the Petition of Right, 1628, the Bill of Rights, 1689, and the Act of Settlement, 1700.

As we are not concerned with the history of the prerogative, we shall conclude by making a few relevant observations which are necessary for its proper understanding in relation to the controversy about alleged supremacy over the statute law.

The prerogative is not based on military force or on the consent of the people. "No one will pretend that any prerogative of the King of England is founded either on military force or on the express consent of the people. Every prerogative of the Crown must, therefore, be derived from statute or from prescription, and in either case there must (83) be a legal and established mode of exercising it."

So far as the war prerogative of the King is concerned, it has been correctly stated in the following statement: "What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various

(82) In Chapter 2 we discussed some of the cases and the events leading to the Petition of Right, 1628.

(83) John Allen, The Royal Prerogative (1849) p.158.

acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations."⁽⁸⁴⁾

Today, the exercise of the prerogative in relation to the prosecution of the war is not important as almost all the powers necessary for such purposes are conferred on the Executive by statute.⁽⁸⁵⁾ What should be the considerations for those who exercise the prerogative powers of the Crown is clearly expressed in the following statement:

"Emergencies may arise, where it is necessary for the safety of the state to commit additional powers to the persons intrusted with its defence. But when such cases occur, we are to be guided by considerations of reason and expediency in the powers we confer, and not by vain and empty theories of prerogative."⁽⁸⁶⁾

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- (84) Chitty, The Prerogative of the Crown, p.50.
 O. J. Reading in Crown of Leons case (1921) 1 K.B. 595 pointed out that these words were spoken by Lord Erskine in a speech in Parliament with reference to the orders in council. "It is to be observed that it is not a judicial pronouncement, but it is quoted by the learned author as a correct statement of the law."
- (85) "The statutes have been drawn so broadly as to include practically all action taken." B. Schwartz, Law and the Executive in Britain, p.314.
- (86) Note 83, at p. 159

An examination of the few cases in which the legal limits of the Crown's prerogative in relation to the prosecution of the war were considerably discussed shows the fallacy of the claim that the Executive can exercise powers as part of the common law though it is found unable to justify its action under the statute dealing with the subject matter. In The Zamora, a prize case, the question was raised whether the Swedish steamship stopped by one of His Majesty's cruisers and brought into a British port, could be validly requisitioned by the Government before condemnation subject to appraisal in accordance with Order XXIX of the Prize Court Rules. The steamship, which was carrying copper, a contraband of war, was ostensibly destined for a neutral port. The case involved the determination of the extent of the royal prerogative in International Law and of the right to requisition vessels or goods in the custody of the Prize Court of a belligerent Power.

Order XXIX, rule 1, provided that where it was made to appear to the judge ... that it was desired to requisition, on behalf of His Majesty, a ship in respect of which no final decree of condemnation had been made, he was to order that the ship be appraised and upon an undertaking being given the ship was to be released and delivered to the Crown. The Prize Court Rules derived their force from Orders of His Majesty in Council which were made under the powers vested in His

Majesty by the Prize Court Act, 1894. The Court had to consider whether the Crown had, independently of the aforesaid rule, a right to requisition the vessel or goods in question. The Attorney-General argued that the King in Council had such power by virtue of the royal prerogative and the Solicitor-General contended that the neutral's goods could be requisitioned without payment through no enemy destination was revealed.

In rejecting the argument that such power was vested in the King in Council otherwise than by virtue of the Act of 1894, Lord Parker said:

"The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, having various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in courts of common law or Equity."⁽⁸⁸⁾

Lord Parker found no difficulty in conceding that "there is no doubt that under certain circumstances and for certain purposes the

(88) Ibid, at p.90.

Crown may requisition any property within the realm belonging to its own subjects." He reached the conclusion that the right of a belligerent Power to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released was subject to certain limitations. First, the vessels or goods must be urgently required for the defence of the realm or the prosecution of the war. Secondly, there is a real question to be tried and therefore it would be improper to order an immediate release. Thirdly, the right must be enforced by an application to the Prize Court which must judicially determine whether the right is exercisable.

(89)

In In re A Petition of Right the suppliants claimed a declaration that they were lawfully entitled to proper compensation for and in respect of their lands and premises which the military authorities took for the purposes of an aviation ground or aerodrome. They contended that, by virtue of the Defence Act, 1842, and other Acts of a similar nature, they could legally claim compensation which was to be ascertained as provided for by those Acts. On behalf of the Crown the claim was resisted on the ground that the military authorities took the premises for use so long as the war continued and as they were exercising powers under the prerogative and the Defence of the Realm (Consolidation) Act, 1914, no claim to compensation could be legally enforced against them. They were, however, willing to pay

ex gratia such sum as might be assessed by the Royal Commissioners appointed for the purpose of assessing compensation. It was held that the Crown, represented by the competent naval and military authorities, had power in time of war, both by virtue of the royal prerogative and the Defence of the Realm (Consolidation) Act, 1914, and the regulations made thereunder to take compulsory possession of any lands or premises for defence without compensating the owner.

Lord Cozens-Hardy M.R. said that "the prerogative applied to what was reasonably necessary for preventing and repelling invasion at the present time regard being had to the invention of gunpowder and the
(90)
use of aeroplanes in warfare."

L. J. Warrington^{L.J.} refused to accept the argument that the right was confined to the doing of what was necessary for the conduct of actual military operations against an enemy fighting on the soil of this country:

"So to limit the prerogative would in these days be to render it practically useless for the purpose for which it is entrusted to the King ... The only condition which it would appear must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the realm, and on this matter the opinion of the competent authorities who alone have sufficient knowledge of the facts, provided they act reasonably

(90) Ibid, at p.660.

and in good faith, should be accepted as conclusive." (91)

He also referred to the undisputed fact that the King, as the supreme executive authority, had always been by virtue of the prerogative entitled to take or use the property of a subject in order to meet any national emergency.

(92)
In Attorney-General v. De Keyser's Royal Hotel, the owners of the hotel, which was taken by the Crown for housing the personnel of the Royal Flying Corps, asked for a declaration that they were entitled to a rent for the use and occupation of the premises or, in the alternative, to compensation under the Defence Act, 1842. The Crown, purporting to act under the Defence of the Realm Regulations, 1914, denied the respondents' legal right to compensation. Also, the Crown's prerogative to take the property of a subject in an emergency without compensation was pleaded in bar of the plaintiffs' claim.

We have already seen that similar questions were raised in (93)
In re a Petition of Right. The view that prevailed there, it will be

(91) Ibid, at p.666. Similarly, in Crown of Leon (Owners) v. Admiralty Commissioners (1921) 1 K.B. 595, Lord Reading C.J. could not accept the argument that the prerogative should only be invoked in an emergency, "an instant and urgent necessity," or "a then existing necessity" - "That does not mean that to justify the use of the prerogative you must be able to show that at the precise moment there is a state of things existing that unless the prerogative is invoked the nation will succumb. What, I think, it means is that there must be a national emergency, an urgent necessity for taking extreme steps for the protection of the Realm."

(92) (1920) A.C. 508.

(93) (1915) 3 K.B. 649.

recalled, was that the prerogative allowed the right to take property for sudden emergencies, but the Defence Acts of 1803 and 1842 prescribed a code for the permanent taking of land both in war-time and peace time and the two systems, therefore, could co-exist, especially when no express mention of the prerogative was made in the statute. In this connection the Court also referred to the general doctrine that the Crown was not bound by a statute unless specially mentioned.

In De Keyser's Royal Hotel the question for the consideration of the House of Lords was whether the prerogative to take private property when required for defence entitled the Crown to take it without payment of compensation and incidentally whether, if an Act dealt with something which, before the Act, could be effected by the prerogative, the prerogative was curtailed.

A research into the past history on the subject of taking private property for defence purposes only revealed that "the King, as suprema potestas, endowed with the right and duty of protecting the Realm, is, for the purpose of the defence of the realm, in times of danger
(94)
entitled to take any man's property," but it could not be ascertained whether "this right to take is accompanied by an obligation to make
(95)
compensation to him whose property is taken."

During the last three centuries important changes took place and in the long series of statutes relating to the occupation of land

(94) (1920) A.C. at p.524. In Chapter 7 we discussed the extent of interference with the subject's property during an emergency.

(95) Ibid, at p.524.

for the defence purposes provisions were made for compensating the subjects whose lands were taken or used and indeed, as Lord Moulton said, "there is clear evidence that for many years, prior to the first of these statutes, the Crown acted on this principle."⁽⁹⁶⁾

Finally, the Defence Act, 1842, gave the Crown the widest possible powers to take land and buildings needed for defence. In all cases, however, compensation was allowed for the taking or using the land by the Crown and the compensation was to be assessed by a jury who, in the words of the Act, have to find "the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be."

The other question was, if the whole ground of something which could be done by the prerogative is covered by the statute, is it the statute that rules or is it the prerogative on which the Crown would rely: this evoked considerable discussion.⁽⁹⁷⁾ The House of Lords fully agreed with the principle stated by M. R. Swinfen Eady^{MR.} in the Court of Appeal below:

"Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened, and has provided by statute

(96) Ibid, at p.552.

(97) In Chapter 6 we briefly referred to this controversy.

for powers previously within the prerogative being exercised in a particular manner, and subject to limitations and provisions contained in the statute, they can only be so exercised."⁽⁹⁸⁾

Otherwise, as he asked, "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?"

Referring to the history of the Acts culminating in the Defence Act, 1842, which "was not limited either in time or place, and with small modifications" was still in force, Lord Moulton considered the effect of this course of legislation upon the Royal prerogative. He did not think that it led to the abrogation of the prerogative in any way, but, as he said:

"It has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself."⁽⁹⁹⁾

Moreover, "it has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community."⁽¹⁰⁰⁾

(98) Quoted by Lord Atkinson in De Keyser's Royal Hotel case at p.538.

(99) Ibid, at p.554.

(100) Ibid, at p.554.

Lord Dunedin assigned another reason why the statute should govern and not the prerogative:

"Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being
(101)
curtailed."

Judging the question from another viewpoint Lord Sumner arrived at the same conclusion. He said:

"The Legislature by appropriate enactment can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they deal directly with the subject-matter, even though they enact a modus operandi for securing the desired result, which is not the same as
(102)
that of the prerogative."

The result, in short, is that "when powers covered by this statute are exercised by the Crown, it must be presumed that they are so exercised under the statute, and therefore subject to the equitable
(103)
provision for compensation which is to be found in it." Such a

(101) Ibid, at p.526.

(102) Ibid, at p.561.

(103) Ibid, at p.554.

finding which upholds the safeguards provided by statute would go a long way to meet the demands of justice.

The facts established by this case were summed up by Lord Keith of Avonholm in his dissenting judgment in Bank voor Handel v. Administrator of Hungarian Property where, however, the issue did not involve the determination of the extent of the prerogative to seize the property of persons residing in England, but questions were determined as to the relevant provisions of the Trading with the Enemy Act, 1939. It appeared from the decision in the De Keyser's Royal Hotel case that "there was never a prerogative to confiscate the property of a subject in time of war; that, when the exigency of war had passed, the property would return to the owner; and that, if the disposition of property during war was dealt with by the legislature, that superseded any necessity of invoking the prerogative." To the argument that such power was in the present case reserved by Section 16 of the Trading with the Enemy Act, 1939, Lord Keith replied that "that can only be quantum valeat, and if the prerogative never covered power to confiscate property of a subject during war for war purposes the reservation can be disregarded." He gave two reasons for not holding that the Crown had the prerogative to confiscate the subject's property. First, "if the royal prerogative in the days of its full vigour did not extend to confiscation of a subject's property in time of war, I am not prepared to assume that the Legislature intended to

(104) (1954) 1 All E.R. 969.

(105) Ibid, at p.995.

confer a statutory power to confiscate a subject's property in 1939." Secondly, "such a power would require to be very clearly shown by the language of the statute and never to be presumed."⁽¹⁰⁶⁾

By Regulations made under the Emergency Powers Act, 1920, the government was empowered to requisition ships, to prohibit the unloading of ships etc., and the regulations further provided for the assessment of "the compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations." During a coal strike in 1921 the supplants vessel arrived in the Thames on 2nd April with a cargo of coal and on the same day a Customs Officer gave instructions that "in no circumstances is the vessel to discharge without permission." Accordingly the vessel lay with the cargo till 21st April on which date the government requisitioned the coal and the discharge was completed on 23rd April. Assuming that "the Crown has no right at common law to take a subject's property for reasons of State without paying compensation," J. Wright thought that the rule could apply to a case where property was actually taken possession of or used by the Government. In stating the reasons why the supplants' claim for the period up to 21st April could not be sustained, but that they were only entitled for two days, 22nd and 23rd April, J. Wright said:

"A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because

(106) Ibid, at p.995.

it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he
 (107)
 obeys a lawful order."

(108)
 Under the powers conferred by the Proclamation of 3 August, 1914, the Admiralty requisitioned a ship and sent her on a voyage from Spain to America with a cargo of iron ore for the manufacture of war munitions for the British Government. The ship sustained damage in the course of the voyage and sued the Admiralty on the ground that it had no right to send the ship on the particular voyage. Before a Divisional Court where the case came as a special case stated by the arbitrators under Section 19 of the Arbitration Act, 1889, the owners contended that, if ordinary interpretation was given to the language used in the Proclamation, the effect would be far-reaching. Moreover, neither the Proclamation nor the prerogative justified the use of the ship on the particular voyage. Lord Reading C.J. expressed inability to accept the above contentions and felt that by the Proclamation "it was intended to give the widest possible powers in view of an imminent emergency and in view of the fact that, if war was declared, it was impossible to determine beforehand the ships which the Government would have to

(107) France Ferwick & Co. Ltd. v. The King (1927) 1 K.B. 458 at p.467.

(108) It authorised "the Lords' Commissioners of the Admiralty to requisition any British ship or British vessel within the British Isles or the waters adjacent thereto" and further provided that the owners should receive payment for the use and services rendered and compensation for loss and damage.

(109)

requisition from the subjects of the Crown."

In answering the contention that the prerogative had been exercised and the sending of the ship could not be justified under the prerogative, J. Darling said that one should seek directions from the common law and the constitutional law of England under which "the rule undoubtedly is that the King, acting in regard to what is called prerogative 'regale et legale', has the right on behalf of his subjects to take their property for the defence of the Realm and to protect the interests of the subjects, compensation of course being fairly made."

(110)

(111)

In Rex v. The Suptdt. of Vine St. Police Station, one Alfred Leibmann, a German subject who, for business reasons, came to England in 1889, had resided there ever since but was interned during the First World War. In May, 1890, he obtained a formal discharge from German nationality, but never became naturalised as a British citizen.

The Solicitor-General submitted that the internment of aliens and the taking of any steps necessary to make such internment effective fell within the prerogative rights of the Crown at common law. On behalf of the applicant it was contended that, as there was no authority for the internment of the alien enemies under the Defence of the Realm (Consolidation) Act, 1914, or under the Aliens Restriction Act, 1914, the Crown had no prerogative to do so "because if there were

(109) Crown of Leon (Owners) v. Admiralty Commissioners (1921) 1 K.B.595 at p.603.

(110) (32) Ibid, at p.606-7.

(111) (33) (1915)32 The Times Law Reports 3.

there would be no need of emergency legislation giving the King power to restrict the movements of aliens, to compel them to register themselves and the like." (112) He further argued that "if there is this inherent power in the Crown to imprison there must be also inherent the power to do all the lesser acts provided by the emergency (113) legislation." Though the Court was impressed by such forceful argument, it was not willing to concede it, but at the same time J. Bailhache expressed surprise "why express power to intern alien enemies was not included in the emergency legislation, or why there has been no Order in Council dealing with the subject as it now arises, but I notice that the emergency legislation reserves all the powers (114) of the Crown."

(112) Ibid, at p.5.

(113) Ibid.

(114) Ibid.

CHAPTER 9THE JUDICIAL REVIEW OF WAR POWERS (Continued)1. The Test of "Reasonableness"

(1)

In Liversidge v. Anderson the question of the construction of the words used in regulation 18B of the Defence (General) Regulations, 1939, was raised. Regulation 18B enacted - "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained." The appellant contended that the words "reasonable cause to believe" implied the existence of an external fact which must be the basis of the Secretary's belief and therefore, could be challenged in a court of law. The respondent argued that as the words referred to the belief of the Secretary the reasonableness of the belief~~ly~~ was only determinable by him.

Excepting Lord Atkin, who dissented, all the other Law Lords were of the opinion that if the Secretary of State acts in good faith when making an order under the aforesaid regulation, a court of law is not competent to inquire whether in fact the Secretary had reasonable grounds for his belief.

(1) (1942) A.C. 206.

To Lord Atkin the conferment of such powers, only liable to be questioned on the ground of absence of good faith, was unprecedented. The use of the expression "reasonable cause" showed that the rule contemplated the existence of an external fact which was capable of being ascertained by the court. He said:

"'Reasonable cause' for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause is in our law to be determined by the judge and not by the tribunal of fact if the functions deciding law and fact are divided."⁽²⁾

To establish the meaning of the expression he cited innumerable legal decisions. "If a man has" could never mean "if a man thinks he has." The test to determine the reasonableness was accordingly an objective one.

In declining to accept such an interpretation of the regulation Lord Macmillan said that "a court of law could not pronounce on the reasonableness of the Secretary of State's cause of belief unless it were put in possession of all the knowledge both of facts and of policy which he had. But the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to

(2) Ibid, at p.227-228.

a court or to anyone else the facts and reasons which have actuated
 (3)
 him." A decision on the question whether there was any reasonable
 cause to believe that it was necessary to detain a particular person
 could "manifestly be taken only by one who has both knowledge and
 responsibility which no court can share."

The trend of argument which supported an objective standard to
 judge the reasonableness of the belief would require one to read the
 regulation as "If the Secretary of State has such cause of belief as a
 court of law would hold to be reasonable." It would then no longer be
 effective as an emergency measure. For, as Lord Macmillan said:

"Courts may differ as to what is reasonable. A judge of first
 instance might hold the Secretary of State to have been justified in
 his belief, the Court of Appeal might take another view and this House
 might have its own view. In a matter at once so vital and so urgent
 in the interests of national safety, I am unable to accept a reading
 of the regulation which would prescribe that the Secretary of State
 may not act in accordance with what commends itself to him as a

(3) Ibid, at p.254. Lord Wright said that regulation 18B imposed a
 duty, a duty to act in the national interest, on the Secretary,
 which was a higher duty than the duty to regard the liberty of
 the subject. The performance of that duty could not be subject
 to the decision of a judge who could not possibly have all the
 information at the disposal of the minister or appreciate their
 full importance. He said: "In these cases full legal evidence
 or proof is impossible, even if the Secretary does not claim
 that disclosure is against the public interest, a claim which a
 judge necessarily has to admit." Ibid, at p.266.

reasonable cause of belief without incurring the risk that a court of
 law would disagree with him."⁽⁴⁾

In refusing to accept the contention that "reasonable" necessarily implied an external standard to be applied by someone other than the Secretary, namely, by a judge, Lord Wright said that this would "subordinate the whole substance of the enactment to a single word which itself is ambiguous and inconclusive." He then said:

"The word 'reasonable' does indeed imply instructed and intelligent care and deliberation, the choice of the course which reason dictates. But the choice is not necessarily that of an outsider. If I am right in my view of the effect of the regulation, the choice can only be the choice of the minister. All the word 'reasonable' then means is that the minister must not lightly or arbitrarily invade the liberty of the subject. He must be reasonably satisfied before he acts, but it is still his decision and not the decision of anyone else."⁽⁵⁾

The test thus evolved to determine the reasonableness of an executive measure under regulation 18B is not, according to the majority opinion, the standard of an average prudent man. It is quite possible that the average prudent would regard as sufficient some of the grounds that would lead the Secretary of State to form the opinion that a particular person was of hostile origin or associations and the

(4) Ibid, at p.257.

(5) Ibid, at p.268.

court could also decide upon the reasonableness of those grounds.

"I do not doubt that a court could investigate the question whether there were grounds for a reasonable man to believe some at least of those facts if they could be put before the court."⁽⁶⁾ But who can decide whether if those facts exist it would be reasonably necessary to exercise control over such a person? It would be absurd to suppose that the standard of an average prudent man could be applied to decide this issue. Thus, referring to the necessity of forming the belief whether it is necessary to exercise control over the person in question, his being of hostile origin, Viscount Maugham said:

"To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State of being subject to the discussion, criticism and control of a judge in a court of law."⁽⁷⁾

He was, therefore, of the opinion that the Secretary must have the sole discretion as to the grounds on which he could make the order for detention and also as to the facts which he must have "reasonable cause to believe" before he decided that such person was of hostile origin or associations.

(6) Ibid, at p.220.

(7) Ibid, at pp.220-221.

Lord Wright discussed the reasons why the Executive should have the sole discretion in the matter of such nature. First, the legislature must vest the emergency discretion in someone, and the Secretary of State is the most appropriate person because he alone has the materials for exercising the discretion. Secondly, discretions always involve some latitude of choice and there is no hard and fast issue of fact, such as there is in the trial of a specific charge on indictment. Thirdly, the Secretary of State is responsible to Parliament which can put an end to any abuse.⁽⁸⁾

One of the reasons which went to make up the decision in Liversidge Case was the fear that, unless the Executive was given a free hand, the Court might substitute its own judgment for that of the Executive. But Lord Atkin maintained that such fears were groundless:

"It is said that it could never have been intended to substitute the decision of judges for the decision of the minister or, as has been said, to give an appeal from the minister to the courts. But no one proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. He has to bear in mind that the constable's authority is limited and that he can only arrest on reasonable suspicion, and the judge has the duty to say whether the

(8) Ibid, at p.270.

conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict."⁽⁹⁾

If, according to the views of the majority, the Executive is allowed complete discretion on the basis of "subjective" reasonable cause, the result is, as Lord Atkin thought, that "the only implied condition is that the Secretary of State acts in good faith."⁽¹⁰⁾ Lord Atkin doubted whether such executive good faith could ever be challenged in a court of law, or even challenged whether it could be proved that such good faith was absent.⁽¹¹⁾

In spite of the vigorous dissent of Lord Atkin and the innumerable precedents referred to by him,⁽¹²⁾ the House of Lords thus rejected the objective standard in determining the reasonableness of an executive action and evolved the new doctrine of "subjective" reasonable cause.⁽¹³⁾ The conclusions reached at by the majority may seem regrettable, but it is at the same time undeniable that their decision was primarily based on an interpretation of the scope of war powers, though "the judicial language is not confined to cases arising out of the war emergency."⁽¹⁴⁾

(9) Ibid, at p.239.

(10) Ibid, at p.226.

(11) Ibid, at p.226.

(12) Ibid, at pp.233-236.

(13) Sir C. K. Allen, Regulation 18B and Reasonable Cause, 58 L.Q.R., p.233.

(14) Bernard Schwartz, Law and the Executive in Britain, p.334.

So fears have been expressed that the executive may on the authority of this case seek to justify its action by saying that it seemed reasonable to him and, therefore, beyond any judicial control. (15)

On another ground also objections have been voiced against the subjective theory. It has been argued that if the proposition that "the reasonable cause can only be material in so far as it is an element present to his (the Secretary of State's) mind which determines his own belief, and "the 'cause to believe' is part of the content of his mind" be accepted as laying down a sound rule for determining the reasonableness of the executive action, why should the same not be applied to the reasoning of a constable before he arrests a suspected criminal? If the mental exercises of a Secretary of State cannot be examined in a court of law why should those of a police officer be justiciable? Thus, a distinguished writer found himself unable to reject the argument:

"It is difficult to see why all this psycho-analysis should not apply just as forcibly to a policeman as to a Cabinet Minister, or why the policeman should not say: 'I am required to have reasonable cause. Well, after mature reflection, I came to the conclusion that I had

(15) Sir C. K. Allen, in referring to the doctrine of 'subjective reasonable cause' elicited from the highest tribunal in England and "which is a landmark in the history of executive powers and which, though in a calmer atmosphere it has been doubted and qualified," said that the doctrine still presented "a danger of bringing us near to administrative absolutism." Law and Orders (1956) at p.64.

reasonable cause. 'That element was present to my mind and determined my belief and my conduct. I have satisfied the condition' ... The only answer to him would appear to be that the mind of a policeman is a totally different thing from the mind of a Minister."

(16)

(17)

In Greene v. Secretary of State for Home Affairs, the House of Lords again had to consider the issue raised and decided in the Liversidge case. The appellant, who was detained by an order of the Secretary of State, pressed the view that the interpretation put on the language of the regulation 18B in the Liversidge case was in law untenable. Though he conceded that the Secretary of State must make up his mind whether he had reasonable cause to believe certain matters before issuing an order under the regulation, his decision was not conclusive and he must satisfy the court that the causes which led him to act would induce an ordinary reasonable man to believe those matters. The Secretary of State should accordingly produce before the court the information on which he formed the belief.

As could be foreseen, the House of Lords rejected both these contentions of the appellant and applied the principle enunciated in the Liversidge case. Lord Wright said: "It is enough here to say that the regulation gives to the Secretary of State a plenary discretion to

(16) Sir C. K. Allen, Regulation 18B and Reasonable Cause, 58 L.Q.R., p.235.

(17) 1942 A.C. 284.

make a detention order against the appellant if he has in his own mind and according to his own judgment reasonable cause to believe that the appellant is a person of hostile associations and that by reason thereof it is necessary to exercise control over him."⁽¹⁸⁾

As the Secretary of State was not bound to disclose the grounds on which he formed the belief, there was no need of an affidavit such as he submitted in the case. But if, as Lord Macmillan pointed out, he had to justify the reasonableness of his cause of belief, the court would not be in a position to decide the reasonableness from such an affidavit as it did not set out the information on which he based his belief. "It is only an assurance of the thoroughness of the investigation which he made, not a disclosure of what that investigation yielded."⁽¹⁹⁾

⁽²⁰⁾
In an appeal from the Supreme Court of Ceylon, the construction of regulation 62 of the Defence (Control of Textiles) Regulations, 1945, came up for the consideration of the Judicial Committee of the Privy Council. The respondent, who was the controller of textiles in Ceylon, had cancelled the appellant's textile licence under the aforementioned regulation which empowered him to do so "where the Controller has reasonable grounds to believe" that any dealer was unfit to be allowed to continue as a dealer.

(18) Ibid, at p.305.

(19) Ibid, at p.297.

(20) Nakkuda Ali v. Jayaratne (1951), A.C.66.

The Judicial Committee held that the words in regulation 62, "where the Controller has reasonable grounds to believe," imposed a condition that reasonable grounds must in fact exist before the Controller could validly exercise the power of cancellation.

Lord Radcliffe, who delivered the opinion of the Judicial Committee, distinguished the present case from the decision in Liversidge v. Anderson which, it will be recalled, laid down that the words "has reasonable cause to believe" meant that the Secretary of State "had honestly to suppose that he had reasonable cause to believe" and that, granted good faith, he was "the only possible judge of the conditions of his own jurisdiction." The reasons for the refusal to adopt a similar construction of the words in regulation 62 were that the discussion of Liversidge case was not intended to lay down "any general rule as to the construction of such phrases when they appear in statutory enactments, but was confined to the context and attendant circumstances of Defence Regulation 18B."⁽²¹⁾ As Lord Radcliffe said:

"The elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be understood. ... After all, words such as these are commonly

(21) Ibid, at p.77. Also, in Re Robinson v. Minister of Town and Country Planning (1947) I.K.B. 702, Somervell, & L. J. said: "Words in a statute of course must be construed in their context."

found when a legislature as law-making authority confers powers on a minister as official. However read, they must be intended to serve as a condition limiting the exercise of an otherwise arbitrary power." (22)

2. The Extent of Discretionary Powers During an Emergency

Apart from the cases where, despite the use of such expressions as "has reasonable cause to believe," the reasonableness of executive action was held not to be subject to judicial control, there are other instances of the court's refusal to interfere, for instance when Parliament invested the executive with the sole discretion to take all necessary measures if necessity arose. Though judicial dicta are not wanting that the exercise of discretionary powers must not be (23) arbitrary, the express language which the wartime statutes and regulations employed to confer such powers made it impossible for the court to investigate the adequacy of the reasons prompting the executive to act.

(24)

In Point of Ayr Collieries Ltd. v. Lloyd George, the validity of an order taking control of a colliery made by the Minister of Fuel and Power under the Defence (General) Regulation 55(4) was impugned. (25)

(22) Ibid, at p.77.

(23) "... when it is said that something is to be done within the discretion of the authorities ... that something is to be done according to the rules of reason and justice, not according to private opinion ... according to law and not humour. It is to be not arbitrary, vague, fanciful, but legal and regular." - Per Lord Halsbury in Sharp v. Wakefield (1891) A.C. 173.

(24) (1943) 2 All.E.R. 546.

(25) The Defence (General) Regulation 55(4) provides as follows:-
"If it appears to a competent authority that in the interests

It was held that unless the bona fide nature of the executive action could be challenged, the court would not proceed to inquire into the rapidity or the lack of investigation with which the executive acted. The rule to be followed in these cases was thus stated by Lord Greene M.R.:

"If one thing is settled beyond dispute it is that, in construing regulations of this character, expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen."⁽²⁶⁾

Not only that, the adequacy or the credibility of the evidence, the necessity of making further investigations or taking any immediate step or postponing it for further inquiries are to be determined by the competent authority. For, as Lord Greene M.R. said, "it is the competent authority that is selected by Parliament to come to the decision, and if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister."⁽²⁷⁾

of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that for the purpose of exercising such control; it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person ... to exercise ... such functions of control on behalf of His Majesty as may be provided by the order."

(26) Ibid, at p.547.

(27) Ibid, at p.547.

If the words in a statute or regulation clearly show that the power to make the decision of what is necessary or expedient has been conferred on the Executive and such decision is made by it, the court will not investigate the grounds as the reasonableness of the decision if bad faith is not alleged. In Carltons Ltd. v. Commissioners (28) of Works the appellants, whose factory manufactured food products, were requisitioned by the respondent under regulation 51(1) of the Defence (General) Regulations, 1939. They claimed a declaration that the Commissioners were not entitled to take possession on the grounds that (29) the notice was invalid.

The only course open to the court in such cases is "to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith." Apart from this the court will not inquire into "the reasonableness, the policy, the sense or any other aspect of the transaction."

(28) (1943) 2 All.Eng.R.560.

(29) Regulation 91(1) provides;- "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

(30)

In Re Robinson v. Minister of Town and Country Planning, the Court of Appeal had to consider whether the Minister's decision taken under the Town and Country Planning Act, 1944, was controllable by the court. The Act was designed to meet an unprecedented situation caused by war. The relevant provisions of the Act are: "Where the Minister of Town and Country Planning ... is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area ... should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such a part of this area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister ... "

The Plymouth City Council applied to the Minister concerned for an order under the aforesaid Act, declaring that land in a particular demarcated area in Plymouth should be subject to compulsory purchase. After holding a public inquiry and receiving his inspector's report, the Minister of Town and Country Planning made the order asked for. The applicants moved to have the order quashed so far as it affected their property.

The court made a few observations as to the functions of the executive when entrusted by Parliament with the power to make or not

to make an order according to its discretion. First, the competent executive official is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his functions or derived from a public inquiry. Secondly, in coming to a decision he is not required to act on quasi-judicial principles, though he may follow such principles when holding an inquiry. Finally, an executive act is not to be treated as a judicial decision or even as a quasi-judicial decision and therefore the evidence or lack of evidence at the inquiry which led him to act cannot be questioned before the court. The court will not proceed to substitute its own opinion for that of the Executive.

But, as Lord Green M.R. said, the position is different when the Executive has exceeded the limits within which his powers were to be exercised. He said: "Different considerations, of course, apply in a case where a Minister can be shown to have overstepped the limits of his statutory powers as, for example, where the conditions in which they may be exercised are laid down in the statute and he purports to act in a case where those conditions do not exist."⁽³¹⁾

Where the respondents had, acting under regulation 51(2) of the Defence (General) Regulations, 1939, taken possession of the plaintiff's⁽³²⁾

(31) Ibid, at p.717.

(32) Regulation 51(2) provided:- "While any land is in the possession of a competent authority by virtue of this regulation ... the land may ... be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community..."

heritable properties under a pretended requisition made by the Secretary of State for Scotland, he moved the court to interdict the respondents from cutting, mutilating or removing trees from a certain area of land belonging to him and to declare that the respondents had unlawfully cut and removed trees from the said area. (33)

The counsel for the appellant sought to find in the regulation the court's jurisdiction to interfere with the actions of the competent authority in relation to the land. He submitted that the court must decide whether a particular act was or was not ancillary to the purpose of the regulation. As, however, the words of the regulation appeared to the court to be well chosen, such jurisdiction was clearly excluded. The House of Lords also refused to entertain the question whether the competent authority acted with reasonable care and skill. Further, as Lord Normand said, "in the absence of averments of bad faith or ulterior motive the jurisdiction of the courts is included and the competent authority is the judge of the use which it should make of the land ... " (34)

It is not only for war purposes or the emergency arising out of it that powers not subject to judicial control can be conferred on the executive. Parliament can invest the same unlimited powers for any purpose. (35) The exercise of such discretion by the relevant authority

(33) Demetriades v. Glasgow Corprn. (1951) 1 All.E.R. 457.

(34) Ibid, at p.400.

(35) "It must, however, be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes" - per Somervell J. in Re Robinson v. Minister of Town and Country Planning (1947) 1 K.B. 702 at p.721.

can only be challenged on strictly limited grounds. In one of such
 (36) cases the Court of Appeal considered the principles which should govern
 the exercise of discretion of this kind and were of the opinion that
 "within the four corners of those principles the discretion ... is an
 (37) absolute one and cannot be questioned in any court of law." Lord
 Greene M.R. enunciated the principles which the court must look to
 in considering any question of discretion of this kind:

"The exercise of such a discretion must be a real exercise of
 the discretion. If, in the statute conferring the discretion, there
 is to be found expressly or by implication matters which the authority
 exercising the discretion ought to have regard to, then in exercising
 the discretion it must have regard to those matters. Conversely, if
 the nature of the subject-matter and the general interpretation of
 the Act make it clear that certain matters would not be germane to the
 matter in question, the authority must disregard those irrelevant
 (38) collateral matters."

If the relevant authority fails to remember these principles before
 envisaging such discretion, his action may be challenged on the grounds

(36) Associated Provincial Picture Houses v. Wednesbury Corpn. (1948)
 1 K.B. 223. Under the provisions of the Sunday Entertainments
 Act, 1932, the defendants imposed the following condition in the
 plaintiffs' licence: "No children under the age of fifteen years
 shall be admitted to any entertainment, whether accompanied by
 any adult or not." The plaintiffs sought from the court a
 declaration that such condition was ultra vires.

(37) Ibid, at p.228.

(38) Ibid, at p.228.

of bad faith and dishonesty, ~~or~~ unreasonableness or disregard of public policy and things like that "as being matters which are relevant to the question." Though, as will be seen, the grounds cannot be confined under one head, they overlap to a very great extent.

Similar principles will also be applied in upholding delegated legislation. Thus, in declaring certain regulations of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, not to be valid for unreasonableness either because of the requirements exacted by them from the drivers of motor vehicles or on the ground that they involved a slowing down of motor traffic to an extent which was
(39)
injurious to the commercial community, Scott L.J. approved the state-
(40)
ment of Lord Russell of Killowen in Kruse v Johnson. Here, the Divisional Court was considering a by-law passed by the Kent County Council for restricting street noises, e.g. singing, in a residential area which had been made under the enabling powers of the Local Government Act, 1888. Lord Russell said: "I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because they are unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were

(39) Sparks v. Edward Ash Ltd. (1943) A.C.223.

(40) (1898) 2 Q.B. 91.

manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive that the question of unreasonableness can properly be regarded.⁽⁴¹⁾ Continuing he said that a by-law was not unreasonable merely because particular judges might think it went further than was prudent or necessary or convenient,⁽⁴²⁾ or because it was not accompanied by a qualification or an exception which some judges might think ought to be there.

Be that as it may, this digression to consider a few cases not dealing with a war emergency shows that the courts are guided by the same considerations in upholding discretionary measures, whether they issue out of war legislations or peace time legislations. Whenever such unlimited ~~legislation~~ discretion is conferred on the executive or any other authority by an Act of Parliament, the court has refused to act as a court of appeal from their decisions. Because "if it were not so it would mean that the courts would be made responsible for carrying on the executive government,"⁽⁴³⁾ which cannot be the intention of the legislature.

(41) Ibid.

(42) Same feelings were expressed in Liversidge v. Anderson (1942) A.C. 206.

(43) Per Lord Greene M.R. in Carltona, Ltd. v. Commissioners of Works (1943) 2 All.E.R. at 564.

3. The Rational Basis for Executive Action During War

Our consideration of the English cases involving the interpretation of wartime legislation and measures has revealed the growing reluctance of the courts to review or to declare them ultra vires or even to pronounce them unreasonable in having no just relation to the objects at which they were supposed to be directed. The American practice is in (44) this respect quite different. This is due to the differences in the constitutional laws and principles of the two countries which we (45) already briefly noticed. If any particular legislative measure or any rules, regulations or orders are impugned as unconstitutional before an American court, the judicial task involves a more complex process than in Britain. "Not only must the regulation in question be intra vires the enabling Act, but both the Act and the regulation must be intra vires the Constitution. The courts must therefore first determine the constitutionality of the enabling Act; only after that has been decided can the question of the vires of the regulation be gone into. In determining the latter question, moreover, the American courts can invalidate administrative rules and regulations not only because they are ultra vires the enabling Act in the strict sense, but also because

(44) "It is in this test of necessity and its application by the courts that the American practice diverges sharply from that in Britain where, under the doctrine of Liversidge v. Anderson, it is for the Executive to determine whether the measures taken are necessary to cope with the emergency." Bernard Schwartz, Law and the Executive in Britain, at p.343.

(45) Chapter 8.

(46)
they are unreasonable."

In reviewing cases involving the determination of the extent of the executive authority during war or emergency the American courts adopted the rational-basis rule; the assertion of necessity is not enough; the executive has to prove that the measures taken have a reasonable relation to the necessity. (47) Moreover, as Chief Justice Hughes, in recognising the need to allow the executive wide discretion in time of crisis, said:

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established; what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial (48) questions." Here, as already seen, the American Supreme Court was considering whether a State Governor had the power to regulate property rights by resort to martial law.

(46) Bernard Schwartz, American Administrative Law (1958) at p.73.

(47) "Such measures conceived in good faith, in the face of the emergency and directly related to the quelling of disorder or the prevention of its continuance, fall within the discretion of the Executive," per Hughes C.J. in Sterling v. Constantine (1932) 287 U.S. at 399.

(49)

In Hirabayashi v. U.S. the appellant, who was a Japanese-American, was convicted of violating a Congressional Act of 21 March, 1942, which authorised curfew orders to be made under the Executive Order No. 9066 declaring that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defence premises, and national-defence utilities ... "

In deciding the question whether the restrictions thus imposed were in exercise of the unconstitutional delegation by Congress of its legislative power, and whether they unconstitutionally discriminated against citizens of Japanese ancestry in violation of the Fifth Amendment, the Court also had to consider the reasonableness of the executive action. Inasmuch as the challenged orders were defence measures for safeguarding the American West Coast against the threatened Japanese invasion, danger of sabotage and espionage, the Court had no doubt that "reasonably prudent men charged with the responsibility of our national defence had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation."⁽⁵⁰⁾

(48) Ibid, at pp.400-401. This was approved by Stone C.J. of the U.S. Supreme Court in Duncan v. Kahanamoku (1945) 327 U.S. 314 at p.336. He said, "But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency."

(49) (1943) 320 U.S. 81.

(50) Ibid, at p.94.

Two choices are left to the Executive in a case of threatened danger; it has to inflict sometimes obviously needless hardship on the many or it may sit passive and unresisting. Stone C.J. said:

"We think that constitutional government in time of war is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defence have reasonable ground for believing that the threat is real."⁽⁵¹⁾

If the measures were an appropriate exercise of the war power, could its validity be impaired because it discriminated against citizens of Japanese ancestry? The appellant insisted that the measures taken were unreasonable and inappropriate, as they violated the constitutional guarantees of the Fifth Amendment. In refusing to accept such contentions, Stone C.J. pointed out that every military control of the population of a dangerous area in wartime involved some infringement of individual liberty, just as did the police establishment of fire lines during a fire or the confinement of people to their houses during an air raid alarm. He said:

"The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is

(51) Ibid, at p.95.

not to be condemned merely because in other and in most circumstances
 racial distinctions are irrelevant."⁽⁵²⁾

The Court here was not concerned with the problem of defining the ultimate boundaries of the war power, but was faced with the task to decide whether the curfew order as applied was within the scope of the war power. As Stone C.J. said:

"Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a
 reasonable basis for the action taken in imposing the curfew."⁽⁵³⁾

Two circumstances which went to determine the attitude of the Court were that, immediately prior to the taking of the aforesaid military measures, the Japanese had made a heavy air attack on Pearl Harbour and the common experience that "in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." The Court, therefore, sustained the conviction for the violation of the curfew order imposed to prevent espionage and sabotage in an area threatened by Japanese attack. In the final analysis the Court found that "it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defence afforded
 a rational basis for the decision which they made."⁽⁵⁴⁾ Whether the Court

(52) Ibid, at p.100.

(53) Ibid, at p.101.

(54) Ibid, at p.102.

would have made it was irrelevant.

The military authority, however, did not stop by enforcing the curfew orders on the West Coast of America. Under President's Executive Order No. 9102 the War Relocation Authority was established to "formulate and effectuate a program for the removal from the areas designated ... under the authority of Executive Order No. 9066 ... of the persons or classes of persons designated under such Executive Order" and to "provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate and supervise their activities." A series of Civilian Exclusion Orders applicable to "all persons of Japanese ancestry, both alien and non-alien" were issued by the military commander of the Western Defence Command.

(55)

In Korematsu v. U.S. the appellant, an American citizen of Japanese descent, was convicted of violating the above-mentioned order excluding all persons of such descent from the designated areas. Justice Black, who delivered the opinion of the United States Supreme Court, had to admit that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," though all such restrictions may not be unconstitutional. In other words, the courts must "subject them to the most rigid scrutiny." But, THOUGH HE CONCEDED THAT "exclusion from the area in which one's home

is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.", he found ample justification in upholding the executive or military measures. Justice Black said:

" ... we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast War area at the time they did ... Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."⁽⁵⁶⁾

As the military authorities who had the primary responsibility of defending the country concluded that mere curfew order did not provide adequate protection but that exclusion were necessary, the Court also arrived at the conclusion that such "exclusion from a threatened area no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."⁽⁵⁷⁾

Justice Murphy, who dissented, held different views. He considered that, when the judicial test of the validity of a government order depriving an individual of any of his constitutional rights on a plea of military necessity depends on whether the deprivation was reasonably related to a public danger that was so "immediate, imminent and impending as not to admit of delay" and not to "permit the intervention of ordinary constitutional processes to alleviate the danger,"

(56) Ibid, at p.218.

(57) Ibid, at p.218.

the challenged order did not meet that test. The order was an obvious instance of racial discrimination and denial of the equal protection of the laws guaranteed by the Fifth Amendment. It not only deprived individuals of their substantive rights under the Constitution "to live and work where they will, to establish a home where they choose and to move about freely" but it also, in excommunicating them without the benefit of hearing, deprived them of their constitutional rights to procedural due process. Justice Murphy found no reasonable relation to an immediate, imminent and impending public danger to "support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation (58) in the absence of martial law."

To Justice Jackson the difficulty to determine the reasonableness was presented from a different direction. Besides the fact that the courts can never be in a position to know whether such orders as were (59) considered in the instant case have a reasonable basis in necessity, the consideration that "a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a

(58) Ibid, at p.234.

(59) "In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence," per Jackson J., at p.245.

reasonable exercise of military authority" is no less important.

Justice Jackson thought that "the courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they (60) cease to be civil courts and become instruments of military policy."

To rely on a civil court to review the exercise of military power "so vagrant, so centralised, so necessarily heedless of the individual" seemed to him wholly delusive. He then went on to say:

"The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments (61) of their contemporaries and to the moral judgments of history."

Judging the issues involved here from the viewpoints mentioned above the legalistic approach towards their solution was, according to him, meaningless. Moreover, as he said, "once a judicial opinion rationalises such an order to show that it conforms to the Constitution or rather rationalises the Constitution to show that the Constitution sanctions such an order," the Court will be seen to validate the principle of racial discrimination in criminal procedure which under- (62) lined the aforesaid military orders.

(60) Ibid, at p.248.

(61) Ibid, at p.248.

(62) Ibid, at p.246.

(63)

In a habeas corpus proceeding the appellant, a citizen of Japanese ancestry who was detained in a war relocation centre, challenged the legality of her detention. The military authority was willing to release her only on condition that she should agree to comply with regulations and restrictions regarding leave clearance and other conditions of resettlement in the light of the statute (Act of Congress, 21 March, 1942) and the Executive Orders (nos. 9006 and 9102) which formed the basis of the Japanese evacuation programme. On her representation the military authority arrived at the finding that she had been a loyal American subject. The question whether there was any reasonable basis for the military order in detaining an admittedly loyal citizen or in granting him or her a conditional release was a matter for the consideration of the Court. Justice Douglas of the U.S. Supreme Court was of the opinion that no such power could be "implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established."⁽⁶⁴⁾ If it could be assumed that the original evacuation was justified, its legality was solely due to its being an espionage or sabotage measure, and not because there was community hostility to a particular group of American citizens. As Justice Douglas said:

*The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority

(63) Ex parte Mitsuye Endo (1944) 323 U.S. 283.
 (64) Ibid., at p.302.

to detain a citizen or to grant him a conditional release or protection against espionage or sabotage is exhausted at least when his loyalty is (65) conceded."

According to him, a citizen who was conceded to be loyal presented no problem of espionage or sabotage. "He who is loyal is by definition (66) not a spy or a saboteur." If, therefore, the authority to detain is exercised over such person, the aforesaid measure against espionage or sabotage would be transformed into a different thing. Precisely this was not done by Executive Order No. 9066 or the Act of 21 March, 1942. The court refused to do what the Order or the Act did not do. The standard of necessity did not, at least in the case of the appellant who was conceded to be a loyal citizen, justify her continued detention. "When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no (67) relationship to that objective is unauthorized."

4. The Abuse of Powers

(68)

Two cases which raised the problem of determining the extent of the power of the military authority to establish a direct military rule and to continue for a period of nearly three years, arose out of

(65) Ibid, at p.302.

(66) Ibid, at p.302.

(67) Ibid, at p.302.

(68) Duncan v. Kahanamoku and White v. Steer (1946) 327 U.S. 304.

a regime of martial law in Hawaii. Immediately following the severe Japanese attack on Pearl Harbour on 7 December, 1941, the Government of Hawaii promulgated martial law throughout the territory of Hawaii and suspended the writ of habeas corpus. The Governor's proclamation also authorised the commanding general "during the ... emergency and until danger of invasion is removed, to exercise all the powers normally exercised" by the Governor and by the "judicial officers and employees of this territory." The President approved the Governor's action on 9 December, 1941.

In pursuance of this authorisation the commanding general proclaimed himself Military Governor and undertook the defence of the territory and the maintenance of order. On 8 December, both civil and criminal courts were prohibited from summoning jurors and witnesses and also trying cases. Military tribunals were established to try civilians for violating the laws of the United States and the Territory of Hawaii and rules, regulations, orders and the police of the Military Government. In inflicting punishment, the military tribunals were to be "guided by, but not limited to, the penalties authorised by the courts-martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases." Punishment must be commensurate with the offence committed because the established rule. The death penalty could be imposed "in appropriate cases."

The result was that the military authority began to rule by

simply promulgating orders from time to time and regulated the daily activities of the civilians. The sentences imposed by the military tribunals could not be reviewed by the appellate court, since they were not part of the judicial system of the United States. In short, the authority acted on the assumption that its rule was not subject to any judicial control.

Some eight months after the declaration of martial law, White, a stockbroker in Honolulu, was arrested by the military police. His business was in no way connected with the armed services. ~~By~~ The charge was the embezzlement of stock of another citizen. A military tribunal, designated as a Provost Court, tried, convicted and sentenced him to four years. (69)

Duncan, a civilian shipfitter employed in the navy yard at Honolulu, was arrested after two years of martial rule. He was engaged in a brawl with two armed Marine sentries. He was tried by a military tribunal and sentenced to six months' imprisonment. (70)

In proclaiming martial law the Governor presumably relied on section 67 of the Hawaiian Organic Act, 1900. The question before the (71)

(69) Ibid.

(70) Ibid.

(71) It provides: "That the Governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said territory and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection or rebellion in said Territory, and he may, in

American Supreme Court was whether the provisions contained in Section 67 empowered the armed forces to supplant all civilian laws and substitute military for judicial tribunals.

The decision largely depended on the interpretation of the language used in the Organic Act which, it could be plainly seen, authorised the Governor of Hawaii to invoke military aid under certain circumstances. But it did not define the exact limits to which the military authorities must conform. It is, no doubt, certain, as Justice Black pointed out, that it "did not explicitly declare that the Governor in conjunction with the military could for days, months or years, close all the courts and supplant them with military tribunals." The use of the term "martial law" in the section did not mean that it contained the power to obliterate the judicial system of Hawaii.

Referring to the legislative history of the Islands Government contended that Congress, by the provisions of Section 67, "intended to give the armed forces extraordinarily broad powers to try civilians before military tribunals." The facts were that before Congress enacted the present Act, the Supreme Court of Hawaii, in interpreting the language of an identical section in the original constitution of

case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

Hawaii, held that it empowered the Hawaiian President to authorise military tribunals to try civilians whenever the public safety needed (72) it. Congress, it was learned, adopted the same language and its interpretation by the Hawaiian Supreme Court.

This could hardly suffice to persuade the Court that "Congress was willing to enact a Hawaiian Supreme Court decision permitting" "a radical departure" from "our political traditions and our institution of jury trials in courts of law." Justice Black, who delivered the opinion of the court, said:

"Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history." (73)

(72) Re Kalaniana'ole, 10 Haw. 29. Here, the defendants were rebels who took part in the uprising which the armed forces were ordered to suppress. This case not only upheld military trials of civilians but also held that the courts would not interfere unless there had been clear abuse of power resulting in cruel and inhuman practices or the "establishment of military rule for the personal gain of the President and the armed forces." But the courts would not go into the question whether the President's action was unjustifiable, as being unnecessary for the public safety.

(73) Ibid, at p.322.

Another ground upon which extraordinary measures in Hawaii could not be supported was that Hawaiian citizens were no "less entitled to constitutional protection than others." While Congress, in enacting section 67 of the Hawaiian Organic Act, "intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defence of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."⁽⁷⁴⁾

The principle in all these cases is one enunciated earlier by the United States Supreme Court:

"... the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield."⁽⁷⁵⁾

Justice Burton, however, dissented from the view taken by the majority and speaking for himself and Justice Frankfurter, said:

"Once the islands are visualized as a battle field under actual invasion, threatened with further invasion, and invaluable to the enemy as a base from which to attack the continental United States, the situation is completely changed from that of an ordinary civilian community. Under conditions likely to disregard even the laws of

(74) Ibid, at p.324.

(75) Dow v. Johnson, 100 U.S. 158 at p.169.

civilized warfare, the island population was threatened with immediate destruction. It thus became necessary to organize and protect that population against imminent danger from bombing, fire, disruption of water and food supply, disease and all the other incidents of modern warfare. The limited area, limited garrison and great isolation of the Islands put a premium on the efficiency of its civilian defence and on the integration of it with the military defence. All activity was subordinated to executive control as the best constitutional safeguard of the civilian as well as the military life."⁽⁷⁶⁾

In 1951 there was imminent danger of a strike affecting the steel mills in the United States which would have resulted in an almost complete stoppage of production of this essential commodity. In ⁽⁷⁷⁾Youngstown Steel and Tube Co. v. Sawyer, the American Supreme Court was asked to decide whether the President was acting within his constitutional power when he directed the Secretary of Commerce to take possession of and operate most of the country's steel mills. The mill owners' views were that the President's order amounted to law-making which the Constitution had expressly confided to the Congress. The Government contended that the President made the order on the findings that action was necessary to avert a national catastrophe which would otherwise be caused by a stoppage of steel production. To meet this grave emergency the President was merely acting within the aggregate

(76) (1946) 327 U.S. 304 at 357.
 (77) (1951) 343 U.S. 579.

of his constitutional powers as the Chief Executive and the commander-in-chief of the United States.

In holding that the order could not properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces, Justice Black refused to accept the authority of the cases "upholding broad powers in military commanders engaged in day-to-day fighting in a theatre of war." He said:

"Such cases need not concern us here. Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the commander-in-chief of the Armed Forces has the ultimate power as such to take possession of private property. This is a job for the nation's law-makers, not for its military authorities."⁽⁷⁸⁾

¶

He, further, continued to say:

"Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that "the laws be faithfully executed" refutes the idea that he is to be a law-maker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the constitution is neither silent nor equivocal about who shall make laws which the President is to execute."⁽⁷⁹⁾

(78) Ibid, at p.587.

(79) Ibid, at p.587.

Justice Jackson was also of the opinion that the widest latitude of interpretation could be given to sustain the President's "exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society," but when it was turned inward, "not because of rebellion but because of a lawful economic struggle between industry and labour," no such indulgence was possible. A command power of the Chief Executive in a militaristic system could be implied as being absolute, but in a constitutional Republic it is subject to limitations. Justice Jackson said:

"The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free Government of holding that a President can escape control of executive powers by law through assuming his military role. What the powers of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and the naval establishment."

(80) Ibid, at p.645.

(81) Ibid at p.646.

CHAPTER 10THE LAW OF MARTIAL RULE IN PAKISTAN1. General Considerations

In Pakistan martial law has so far twice been declared. When disturbances broke out in the Punjab in 1953 and the civil authority in the Province failed to maintain and restore peace and order, martial law was proclaimed and continued for about two months and a half. When the necessity for declaring it and its continuance for this long period were challenged before the courts, its nature and function were defined and explained with reference to the notions of Anglo-American jurisprudence. On considering the relevant facts and circumstances, the court found that good grounds existed for such declaration. We shall presently consider them in detail. The second occasion when martial law was proclaimed (it is still continuing) was by President Iskander Mirza's Proclamation of 7th October, 1958, which abrogated the Constitution of Pakistan of 1956, dissolved the National and Provincial legislatures and vested the supreme authority of the State on himself as the President of Pakistan and the Chief Administrator of Martial Law.

Some care has been taken to narrate the facts and legal decisions of the present regime in Pakistan under martial law because, as will be seen, it differs fundamentally from the Commonwealth and American

(1)
 conceptions of the subject. The reasons advanced for the promulgation of martial law on the second occasion would appear to be, not the existence of rebellion or invasion but political and constitutional deadlock, so mention must be made of the constitutional developments in Pakistan prior to October, 1958. Apart from the Protectorate period in England, martial law as a form of government, when no rebellion or invasion threatens the existence of the State, has never been previously tried in any of the countries of the Commonwealth or U.S.A. Those who have commented on the present system of government under martial law in Pakistan compare it to a mild sort of dictatorship or seemingly benevolent military government.

An examination of the proclamation of martial law in 1953 and the acts done by the military authority reveals some confusion regarding the nature and extent of the exercise of discretionary powers; the same lack of clarity is evident in the acts of the present regime in Pakistan. Unless the limits of authority are succinctly defined and the rulers and the ruled are guided by the clearly expressed principles, the result is bound to be unhappy. To declare martial law is not to assume the negation of laws; in Anglo-American legal systems martial law is a branch of Constitutional Law and

(1) "It is not at all common to find Martial Law being introduced over a whole country in circumstances of general peace," per Cornelius J., as he then was, in The Province of East Pakistan v. Mehdi Ali Khan, P.L.D. 1959 S.C. 387 at p.439.

though there has been a lack of unanimity as to the nature of the authority exercisable by the military forces and a resulting vagueness as to the content of martial law, still, as has already been seen, the various legal decisions of these countries have enunciated some common principles from which no violent departure has so far been made.

To the vagueness as to the meaning of martial law and the misconceptions about it in the minds of lawyers in the Commonwealth and elsewhere has been added, so far as Pakistan is concerned, the further confusion of its people regarding various modern legal institutions and principles and their values in improving their economic and social conditions. This would seem to explain the prolonged continuation of martial law in Pakistan and its institution as a form of government. As our scope is limited we shall briefly refer to these uncertainties and misconceptions as occasion arises.

Distinctions will be drawn between martial law as commonly understood by the Commonwealth lawyers today and martial law as administered at present in Pakistan, but they will merely reveal that it is a misnomer to call the latter martial law administration. We shall indicate the points of departure from the common law system, not only with regard to the exercise of martial law powers, but also as to the general conduct of the ordinary government business.

With these few preliminary remarks as to the nature of martial law being at present administered in Pakistan, we shall proceed to

consider the background which led to the proclamation of martial law in the Punjab in 1953. Here the discussion as to whether it was necessary to proclaim martial law will engage our attention more than the administration of martial law itself.

2. Events leading to the Punjab disturbances in 1953 and the Proclamation of Martial Law

In March 1953 martial law was declared in Lahore and continued till the middle of May. Before the declaration of martial law the police had opened fire at several places. As a result of such firing two persons were killed on 4th March and ten persons on 5th March; sixty-six persons were wounded. When the armed forces were called in to quell the disturbances, eleven more persons were killed and forty-nine were injured. There were other casualties caused by the police or military firing in other towns in the Punjab.

A Court of Inquiry with Muhammad Munir C.J. of the Lahore High Court, as he then was, as its Chairman, was set up under the Punjab Disturbances (Public Inquiry) Act, 1953, to hold an inquiry into the disturbances in the Punjab which led to the proclamation of martial law. The terms of reference were:-

(i) the circumstances leading to the declaration of Martial Law in Lahore on 6th March, 1953;

(ii) the responsibility for the disturbances; and

(iii) the adequacy or otherwise of the measures taken by the

Provincial civil authorities to prevent, and subsequently to deal with,
 (2)
 the disturbances.

The Report of the Court of Inquiry has fully discussed the genesis of, the responsibility for, and the appropriateness of the measures adopted by the civil authority to prevent, the disturbances. As some of the administrative problems and the failure to solve them were due to extraneous considerations, we propose to discuss the Report briefly but as a whole.

(a) Cause of the Disturbances

The immediate cause of the disturbances in Lahore was the rejection by the then Prime Minister of Pakistan, Khwaja Nazimuddin, of a few demands made by the Majlis-i-Amal, a sort of Committee of Action constituted by the All-Pakistan Muslim Parties Convention. (3) The Central Government at Karachi had not only refused to accept the demands served in the form of an ultimatum, but also ordered the arrest of the prominent leaders of the movement. This led to demonstrations and processions which in the end turned into disorders and outbreaks of violence.

The controversy which led to the demands is popularly known as

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- (2) Report of the Court of Inquiry constituted under Punjab Act II of 1954 to inquire into the Punjab Disturbances of 1953.
- (3) The demands were that "if within a month the Qadiani Ahmadis were not declared a non-Muslim minority and Choudhury Zafrullah Khan, the Foreign Minister who is an Ahmadi, and other Ahmadis occupying key posts in the State, are not removed from their offices", it would resort to direct action.

the "Ahrar-Ahmadiya" controversy which has continued for over half a century. (4) It relates to sharp doctrinal differences between the Ahmadis and the other Muslim sects. Why, it may be asked, did such differences of opinion assume such importance as to produce open defiance to the authority of the State? Though it is understandable that, if popularly held beliefs are challenged, especially when they are primarily religious, vigorous and vehement protests will be made, for a proper understanding of the real motives behind the movement some explanation of the ideology of certain sections of the people is necessary.

The creation of the State of Pakistan was viewed differently by different people and the Ulema (the Islamic doctors in theology) had their own views. Their ideology was that "implicit in the demand for Pakistan was the demand for an Islamic State." (5) They further claimed that their aspirations were met by the passing of the Objectives Resolution in 1949 by the Constituent Assembly of Pakistan, which was later incorporated as the Preamble to the Pakistan Constitution of 1956.

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- (4) The Ahmadis are the followers of one Mirza Ghulam Ahmad of Qadian who started a new religious movement known as 'Ahmadiya', after his name, or 'Qadiani', after the place of his birth. The Ahrar was a party of nationalist Muslims, which seceded from the Indian National Congress, but at the same time opposed the creation of Pakistan. After the Partition, therefore, "no scope for activity was left for the Ahrar in India or in Pakistan" and in order to "capture a political living space" began to exploit the controversy. As the events subsequently proved their reading of the psychology of the Muslim masses were correct. They succeeded in rallying public opinion in favour of the movement against Ahmadis.
- (5) The Report, at p.201.

If their views were correct, the demands were but logical conclusions. If, in pressing their demands on the strength of the Islamic ideology, the Ulema did not pause to consider the other commitments of the State, nor did they concern themselves with the assertions made by such eminent persons as Iqbal who conceived the idea of Pakistan, or even Jinnah, the founder of Pakistan, the fault was not theirs. Things should have been explained and discrepancies between unattainable ideologies and claims of the State brought to light but, as will be seen, both the Central and Provincial governments avoided taking unpalatable decisions and incurring unpopularity. The result could well be imagined.

(b) The Responsibility for the Disturbances

Apart from the immediate causes the following factors were referred to by Mr. Daultana, the former Chief Minister of the Punjab, as being responsible for the disturbances:

- (i) the general hostile attitude against the Ahmadis,
- (ii) the provocative behaviour of the Ahmadis,
- (iii) the vague religious basis of the national ideology of

(6) Dr. Iqbal, in his presidential address to the Muslim League in 1930, said: "Nor should the Hindus fear that the creation of an autonomous Muslim States will mean the introduction of a kind of religious rule in such States." Mr. M. A. Jinnah, in his speech of 11th August, 1947, to the Constituent Assembly of Pakistan said: "... you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State."

Pakistan which gave strength to mullaism and plausibility to the mullahs' way of dealing with political principles,

(iv) the role of the Ahrars in using the controversies for political purposes,

(v) the participation of the general body of the Ulema,

(vi) the failure of the political leaders to give a correct lead to the people,

(vii) the activities of the malcontents.

Besides these he mentioned other general grievances against the government as aggravating the situation.

A very naive argument urged by the Committee of Action was that the disturbances would not have occurred if the Government had acceded to its demands and had not ordered the arrest of the leaders of the movement. Such a contention is, of course, wholly unacceptable.

(On considering the attitudes of both Central and Provincial governments the Court of Inquiry felt that though law and order was a Provincial subject "something more than a motion of legal and administrative mechanism" was necessary to control a population when it was seized with such religious frenzy. In its opinion "this something did not exist in the Punjab and was not thought of in Karachi." (7)

(c) Reasons for the Failure of the Provincial Civil Authority to maintain peace and order

It may to some extent be true that both the unsophisticated Ulema in particular and the people in general could be induced to believe in a certain state of things, but the problem which would seem to baffle an outside observer is the distressing failure of the government to tackle with the situation which could not be said to defeat all human ingenuity. The government could not plead ignorance. The advisability of taking suitable steps will be evident from the recommendation of the high officials of the State. ⁽⁸⁾ There was also no need to enact fresh legislative measures; appropriate steps could be taken against a few persons under the provisions of either the ⁽⁹⁾ Pakistan Penal Code, or the Punjab Public Safety Act. ⁽¹⁰⁾

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- (8) "I am convinced that if Government continue with its present policy of leaving the Ahrar alone, they will sooner or later perpetrate such a horrible crime that Government will find it difficult to explain its failure to take action upon what the C.I.D. has been repeatedly and vehemently reporting to it ... But some Government somewhere must give the masses a correct lead. If every party is afraid that the Ahrar will join hands with the Opposition, it will be difficult to maintain law and order", per Qurban Ali Khan, Deputy Inspector-General of Police, Punjab, Ibid, at p.314.
- (9) Section 153A of the Pakistan Penal Code provides as follows: "Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects, shall be punished with imprisonment which may extend to two years, or with fine, or with both."
- (10) The motive for enacting this abnormal piece of legislation was to provide the executive with sufficient reserve powers to act in an emergency. Section 3 of the statute empowers Government to detain a person, if such course is considered by Government to be necessary to prevent the person concerned from acting in any manner prejudicial to the public safety or public order. Section 5 enables the Government to make an order to restrain such a person from making public speeches. Section 6 gives to the Government

One of the reasons, apart from whatever political motives there might have been, was the arrangement by which the President of a political party was at the same time allowed to occupy the position of the Chief Minister of the Province. In such cases if there was a conflict between the dual personality of the same individual, inaction was as likely as domination of one personality by the other. What happened in the present case was that Mr. Daultana, the Chief Minister of the Punjab, and who was also the President of the Provincial Muslim League Party, declined to take action, because it would make him and his party unpopular. "The Punjab Public Safety Act was a hated Act to the politician and whenever any recommendation for taking action under the Act was made, it was looked upon with political spectacles and, in the decisions taken, the politician throughout dominated the administrator." (11) Under the stress of the emotions of the moment it was forgotten that administrative problems remain no less administrative

~~EXTENSIVE CONTROL ON PRESS AND NEWSPAPERS SECTION 12~~

extensive control on press and newspapers. Section 12 empowers a District Magistrate to prohibit the holding of any processions or demonstrations in any public place, or any public meeting. Section 21 declares it to be a punishable offence for a person to make any speech or to publish any statement, rumour or report, if such speech, or publication causes or is likely to cause fear or alarm to the public, or if it defames or is likely to defame any Government in Pakistan or any servant of the Crown or if it furthers or is likely to further any activity prejudicial to the public safety or the maintenance of public order. Section 23 punishes the performance of any mock ceremony resembling any ceremony associated with or consequent upon death.

(11) The Report, at p.278.

though they may originate from or emerge out of the bitterest political or religious controversies of the day.

(d) Inadequacy of the Measures adopted by the Provincial Civil Authority to restore peace and order

We may now turn to consider briefly the role of the officers who were responsible for the maintenance of law and order in the Province. The Report ends by recording its firm conviction that "if the Ahrar had been treated as a pure question of law and order without any political considerations, one District Magistrate and one Superintendent of Police could have dealt with them."⁽¹²⁾

Naturally the question arises why could not the situation have been so controlled, even after the Central and Provincial government's inaction had led to the outbreak of the violence? Why was there such a spectacular failure of the administrative machinery to maintain law and order so that martial law had to be declared? Politics, as has already been seen, dominated the scene right from the beginning till the outburst of violence. But why did the civil authority fail to suppress the disturbances? In discharging their normal duties, they should have ignored the causes of the disturbances and the propriety or reasonableness of the demands. The governments of the day might have gone on arguing endlessly over the question "to be or not to be" on this particular issue, but it is difficult to imagine reasons for the

(12) Ibid, at p.387.

failure of the civil authority to suppress the breach of the peace.

The threat was not only imminent; it was actual and real.

The District Magistrate of Lahore was primarily responsible for the maintenance of law and order in the metropolitan city. Though there has been reference to the presence of "too many cooks", that is to say, a number of high officials, such as the Inspector-General of Police, the Home Secretary, the Chief Secretary and even the Governor of the Province, who ought to have been previously consulted by the District Magistrate, it has nowhere been suggested that, once violence broke out, he was hampered in his activities by higher authority till the decision was made to proclaim martial law. So far as the subject of "too many cooks" is concerned, it may be pertinent to observe that, if this was the true state of facts as to the machinery for the maintenance of law and order in the Provincial capital, it was surely a clumsy arrangement. There should not have been any distinction in this respect between the functions of the District Magistrate of a metropolitan city and his counterpart in a mufassil district. He must have as free a hand in controlling disturbers of the peace as an officer in charge of a remoter district. And, unless there is an indication of a failure on his part, men on the higher rung of the official hierarchy must not assume the directive role.

(e) The relationship between the Civil and Military authority before martial law was declared

Some comment is necessary on the relationship between the civil and military authorities when the latter was called in merely in aid of

the civil power. We have, it may be recalled, discussed this matter
 (13) elsewhere. However, in the present case allegation was made about
 the lack of proper co-operation and co-ordination between the police
 and the members of the regular Armed Forces. Instance was even cited
 when certain sections of the men on the street preferred to garland the
 military officers at a time when their function demanded the assump-
 tion of a strictly neutral role. Be that as it may, the evidence
 disclosed that the military authority were "not anxious to help" unless
 (14) they were given "complete control." On the other hand the Army was
 aggrieved that "the police were not dealing firmly" with those
 responsible for causing the actual disturbances. It was even suggested
 that timely action would have saved the necessity of employing the
 soldiers. As General Azam said:

"Half-hearted measures and poor leadership resulted in chaos.
 The police force were first class, and if they had followed a firm
 policy at a certain stage, they could have dealt with the situation
 (15) without the help of the Army."

Such a state of affairs was regrettable, because this lack of
 co-ordination and understanding between the two forces ~~and the~~ made the
 proclamation of martial law necessary. Muhammad Munir C.J. could not
 help commenting: "It naturally struck us as a very unhappy position
 that there should be any such formality between the two forces pursuing

(13) Chapter 5.

(14) The Report, at p.373.

(15) Ibid, at p.381.

(16)
the same end." In our considered opinion the Report should have submitted their suggestions as to how relationship between the Army and the police should be governed in future on similar occasions.

The need for express regulations in this respect will also be felt if the matter is considered from another aspect inherent in the situation. When two forces under different commands are employed at the same time and placed to discharge similar functions, conflict is bound to arise. However solicitous both of them may be to assist each other, the clash of will would seem inevitable. The present case was no exception as would be evident from the following passage:

"The military contingents were also to use force, 'if necessary', but they were to act under the orders of their commanders. The commanders themselves were to use their own discretion "under the general directions given by the G.O.C." The words within commas create a difficult position. Who was to decide whether force was "necessary"? If the commanders were to use their discretion, then they themselves would decide. But suppose the police officer started using force and the military commander thought it was unnecessary, or if he thought force should be used and the police officer did not use it. How would the commander be "supporting" the police contingent in that event? (17)

(16) Ibid, at p.373.

(17) Ibid, at p.375.

3. The Judicial Attempt to Define Martial Law

Valuable as the findings of the Court of Inquiry were, its utterances were not judicial. Moreover, the Court did not consider the meaning of martial law, nor did it determine the extent of powers exercisable by the Armed Forces when martial law had been declared.
 (18)
 In a case arising from the acts of the military authority enforcing martial law during the Punjab disturbances, the Lahore High Court discussed several aspects of their authority. Incidentally, the Court referred to the different senses in which martial law is used and also considered whether powers conferred on the military authority
 (19)
 by the Martial Law (Indemnity) Ordinance, No. II, 1953, could be validated. The main contention before the Court centred upon the
 (20)
 question whether Section 7 of the Ordinance which provided for the continuation of sentences by special military courts even after martial law had ceased to exist, was ultra vires the Governor-General's power to promulgate ordinances.

The appellant had moved the application for relief in the nature of habeas corpus under Section 491 of the Code of Criminal Procedure

(18) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore 825.

(19) Appendix VI.

(20) It provided: Confirmation and Continuance of Martial Law Sentences of Confinement. (1) Every person confined under and by virtue of a sentence passed by a Court or other authority constituted or appointed under martial law and acting in a judicial capacity shall continue liable to confinement until the sentence, reduced by remissions, if any, earned under the rules applicable to the serving of such sentence, is served, or until he is released by order of the Central Government.

on the allegation that the prisoner, a member of the Provincial Legislative Assembly, was being illegally detained under the aforesaid provisions of the Ordinance. Further, he challenged the introduction of martial law, the constitution of the special military courts, the procedure adopted by them which did not conform to the ordinary forms of criminal trials and the continuation of martial law after the necessity for it had ceased.

Government contended that the Ordinance indemnifying servants of the Crown and other persons in respect of acts done in good faith and validating sentences of special military courts was validly promulgated under section 42 of the Government of India Act, 1935, by the Governor-General.

(a) The Different Meanings of Martial Law

In attempting to give an indication as to the proper meaning of martial law Muhammad Munir, C. J. of the Lahore High Court, as he then was, referred to the different senses in which it is used in constitutional jurisprudence. Firstly, it relates to the law as to "discipline in the armed forces of the State which is administered by tribunals, called courts-martial." Secondly, martial law means "military government in occupied territory and is used to describe the

(21) Md. Umar Khan v. The Crown, P:L.R. 1953 Lahore at p.829. In Pakistan, if this sense be accepted, martial law would mean "the law administered by courts-martial law constituted under the Army Act, the Naval Discipline Act, and the Air Force Act."

powers of a military commander in times of war in enemy territory."⁽²²⁾

Thirdly, it means "the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrections or other disorders in the land."⁽²³⁾

In this sense it is recognised by the law of England and "there are several ancient statutes which make it incumbent not only on the citizens but also Crown servants, including the army, to assist civil authorities in suppressing disorders."⁽²⁴⁾

In American Constitutional law, martial law in this means a "form of police power of the State" and it is applied "when the military arm does not supersede civil authority but is merely called upon to aid such authority in the execution of its civil functions."⁽²⁵⁾

In the opinion of Munir C.J. it was a "misuse of the term to describe these rights and duties as martial law; they are no more than a part of the civil law of the land."⁽²⁶⁾ In Pakistan these rights and duties of citizens and servants of the Crown, including the armed forces, are laid down in the provisions of the Pakistan Penal Code, the Code Criminal Procedure and the Police Act.

(22) Ibid, at p.829. The Duke of Wellington understood martial law in this sense when he said:

"Martial Law is neither more nor less than the will of the General who commands the army."

(23) Ibid, at p.829.

(24) Ibid, at p.829.

(25) Ibid, at p.835.

(26) Ibid, at p.830.

He, however, failed to mention that the Petition of Right, 1628,⁽²⁷⁾ expressly prohibited the declaration of martial law in England. He also did not consider that, though assumption of powers necessary to suppress disturbances is allowed under English law, such assumption would not ordinary result in the suspension of the Constitution. "Martial law, more often used as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts ... Now this kind of martial law is in England utterly unknown to the constitution."⁽²⁸⁾ The only acts permissible during the martial rule are as have been described by Dicey:

"Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a court-martial law is illegal, and technically murder."⁽²⁹⁾

¶ Muhammad Munir C.J. also came to the conclusions that the setting up of special military courts with a view to punishing people for

(27) We have fully discussed the incidents leading to the declarations contained in the Petition of Right in Chapter 1.

(28) A. V. Dicey, The Law of the Constitution (1959) Tenth ed., at p.291.

(29) Ibid, at p.293.

contravention of Martial Law Regulations or Orders could only be justified if the orders passed by such courts were necessary for the preservation or restoration of order. "If the object in inflicting sentences of imprisonment was not preventive but punitive in the sense in which civil courts punish criminals, the sentences can have no reference to necessity and would, therefore, automatically come to an end with the withdrawal of the martial law."⁽³⁰⁾ But strangely enough, as we shall see, he held that the sentences passed by the special military courts could be legally enforced on the expiry of martial law, because Section 7 of the Martial Law Ordinance No. II of 1953 so enacted.

Further, though Muhammad Munir C.J. was of the view that, on a comparison between the provisions of law in Pakistan with those of English law, "it will be apparent that the rights and duties of citizens, including servants of the Crown and the military, are substantially identical in both systems,"⁽³¹⁾ he failed to indicate in which sense martial could then be applied in Pakistan. Is it in the sense in which once the Constable and Marshal's Court in England used to administer it? Or the sense in which it was understood by the Duke of Wellington - the will of the General commanding the army in a conquered country? Or does martial law in Pakistan mean the "suspension of ordinary law and the temporary Government of a country

(30) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore at p.843.

(31) Ibid, at p.835.

or parts of it by military tribunals," in which sense it "is unknown to the law of England." (32)
 (33) Nowhere in the judgment have the principles underlying the assumption of extraordinary powers by the executive or the armed forces been clearly enunciated. It seems, from the judgment as a whole, that he had in mind the current English notions of martial law, that is to say, "the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law." (34) This is evident from his following assertion:

"Every person, whether a Crown servant or not, is justified under the law of this country to assist others, including Government servants, in the protection of person and property. This right of a person to protect the person and property of others from harm is recognised by those sections of the Penal Code which deal with the right of private defence." (35)

The vagueness as to what martial law is appears in other matters connected with the subject.

(b) The Extent of Military Authority

Nobody would perhaps quarrel with the proposition that the executive or the military authority may assume all necessary powers to

(32) A. V. Dicey, The Law of the Constitution (1959) Tenth ed., at p.287.

(33) Ibid.

(34) Ibid, at p.288.

(35) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore at p.834.

suppress breaches of peace, but to say that martial law means "the will of the General who commands the army" is, as already seen, subject to qualification. So far as the domestic situation is concerned, such high views of the authority of the Armed Forces have not been favoured by the jurists. The unlimited exercise of authority by the commander of the military forces has been recognised as a part of the jus belli, and can only be permitted in times of war in enemy territory. Confusion should, therefore, have been avoided between the two notions of martial law just mentioned.

The failure to remember the distinction between these two apparently similar, though by no means identical, views had led to wrong conclusions as to the powers exercisable during martial rule. Thus, when Muhammad Munir C.J. said that "during such period, all constitutional guarantees are suspended and the officer in chief command of the forces operating in the troubled area acquires for the time being supreme legislative, judicial and executive authority",⁽³⁶⁾ he was inwardly disposed to the views expressed by the Duke of Wellington. This becomes more explicit by his utterance which immediately follows the aforesaid observation:

"In other words, he himself fixes the limits and definition of his own authority. He makes his own law, sets up his own courts and no civil authority, while he is in command, may call into question what

(36) Ibid, at p.838.

he does. In this sense, therefore, martial law is not law at all but
 (37)
 the will of the officer commanding the army."

Even assuming that martial law is "the will of the General who commands the army", it would be extremely incorrect to say that when "a commander, who steps in to quell a rebellion, inaugurates a reign of lawlessness and a civil authority, legislative or executive, which hands over the civil populace of a locality to the military, places the life, liberty and property of the people at the feet of the
 (38)
 General who commands the army." Not to speak of the exercise of military authority within the country, even in enemy territory the military government established by a foreign power cannot introduce a "reign of lawlessness". Theoretically the will of the General commanding the army of the occupying power may be supreme, but The Hague Convention of 1907 and the ~~General~~ Convention of 1949 have imposed
 (39)
 certain restrictions on the exercise of his authority.

However regrettable the confusion between the notions of military government in a foreign country and martial law may seem to be, it has persisted all through the judgment. Thus, Muhammad Munir C.J. seems to have taken different views as to the extent of the authority of the

(37) Ibid, at pp.838-9.

(38) Ibid, at p.839. Referring to the declaration of a "state of siege" in France which leads to the suspension of fundamental rights and consequently to arrest, imprisonment or execution at the will of a military tribunal Munir C.J. said that this kind of martial law was "completely foreign to the British or American Constitution."

(39) British Manual of Military Law, Part III (1958).

military commander when he considered martial law as the law of necessity. He said: "Now because the professed justification for the military to step in is the disturbance of public tranquillity and the object is to restore civil authority to its normal condition, the scope of the activities of a military commander extends only to taking such action as is necessary for the restoration of law and order, and all acts that fall within the scope of that activity will certainly be validated for the martial law period by an indemnity bill. A military commander, therefore, incurs a serious risk if, beyond doing what is necessary for the restoration of law and order, he takes upon himself other functions which have nothing to do with the restoration of normal conditions."⁽⁴⁰⁾

This, however, appears to be a reasonable statement of the powers of the military authority during the continuance of martial law. It shows that his powers are not unlimited, but can and should only be exercised if justified by necessity. It is obvious that if the authority is guided by the standard of "the will of the General who commands the army", their action is bound to be very much different from the one taken with reference to the law of necessity. If, short of a formidable rebellion or invasion, it becomes necessary to declare martial law, the second of the above two views is clearly preferable. It is needless to emphasise the subtle distinction that exists between them.

(40) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore at p.840.

(c) When can Martial Law be declared?

In any case involving questions as to the meaning of martial law it is also important to decide the circumstances justifying its declaration. Controversies, as already noticed, exist as to whether it can be enforced unless in time of war. When does war exist? It prevails when the ordinary courts are not open. ⁽⁴¹⁾ The "open court" theory ⁽⁴²⁾ was, however, partially modified in some of the English cases. In this connection it is also necessary to determine the extent of the jurisdiction of the ordinary courts. Excepting brief references to these important matters, there is no clear statement about them in the judgment. Neither is there any conclusion, as is evident from the following passage:

"Just as the transition from civil tumult to rebellion and from rebellion to war is easy and imperceptible, so the common law doctrine of the right to use force against force can be extended to justify the use of necessary force where riots have assumed the form of armed insurrection or open rebellion amounting to war. There is authority for this proposition in the Privy Council case of Tilonko v. Attorney-General, ⁽⁴³⁾ which was followed by the House of Lords in Clifford v. O'Sullivan ⁽⁴⁴⁾ and in the Queen's Bench case, Phillips v. Eyre. ⁽⁴⁵⁾ On such occasions the civil courts may still function, though a delicate

(41) Chapter 6.

(42) Ibid.

(43) (1907) A.C.93.

(44) (1921) 2 A.C. 570.

(45) (1870) 6 Q.B.D. 1.

position may develop where, while the courts are functioning, the military seek to oust their jurisdiction by setting up their parallel tribunals and claiming paramountcy for them." (46)

(47)
Muhammad Munir C.J. then referred to Wolfe Tone's case and quoted the judgment at length, but instead of seeing in it the best illustration of "the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence" (48), he saw in it an instance of the conflict between the civil and the military authorities of the State. He said: "Where any such conflict between civil law and martial law arises, the antagonism becomes so irreconcilable that in the conflict one or the other must perish, the civil courts claiming that they have jurisdiction to judge whether war exists to oust their jurisdiction and the military commander asserting that there is war and that his will is supreme." (49)

Further, he referred to the observations in the case of Marais v. G.O.C. (50) that where war prevailed the ordinary courts had no jurisdiction over the action of the armed forces but it was for the civil courts to decide whether a state of war existed or not. It appears that Muhammad Munir C.J. was expressing his agreement with the views mentioned in these cases, but as this was in the earlier part of his judgment, when he was expounding the state of law in Pakistan, it might have been more clearly indicated.

(46) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore 835.

(47) (1798) 27 Howell's State Trials 614.

(48) A. V. Dicey, The Law of the Constitution (1959) Tenth ed., at p.293.

(49) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore 835.

(50) (1902) A.C.114.

(d) The Court's Jurisdiction during Martial Law

So far as judicial control of military action is concerned, Muhammad Munir C.J. agreed with the opinion that civil courts could not call into question the legality or propriety of its action.

"Durante bello, therefore, the will of the military commander is as supreme in the area as if he were in military occupation of the enemy territory." (51) He, however, noted the difference between the exercise of power by a military commander in an occupied territory and in his own country. "Whereas the subjects of a belligerent country, who reside in occupied territory, have no legal right against the military, the persons on whom the military commander exercises jurisdiction in his own country in times of peace have rights with which he can interfere only in the expectation that after the termination of the state of affairs his actions would be ratified by the legislature." (52) In answering why "so long as martial law lasts such orders cannot form justiciable issues before the civil courts," he candidly admitted that they would not be so "not because the civil courts have no jurisdiction but because their jurisdiction can at any time be ended by show or use of force by the military." (53) But when martial law no longer exists "the threat to the existence of the civil courts disappears and they can then not only function in a normal way but also call in question the acts of

(51) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore at p.841.

(52) Ibid, at p.841.

(53) Ibid, at p.842.

the military, whose only defence then can either be the right of private defence or the right to dispose unlawful assemblies or some indemnity legislation."⁽⁵⁴⁾

(e) The Trial by Military Tribunals and its Legality

One of the strong arguments in passing the Petition of Right, 1628, was not so much the assumption of powers to suppress disorders as the trial of citizens by special and military tribunals. As a matter of fact such tribunals (courts-martial which try soldiers for breaches of military rules and regulations governing their conduct must be excepted) are unknown in England. This was noted by Munir C.J. : "In fact in pure Anglo-Saxon system of law the setting-up of military tribunals to exercise what in substance are judicial powers is not recognised at all."⁽⁵⁵⁾⁽⁵⁶⁾

(f) Continuation of Sentences by Military Tribunals

In the British dominions and colonies where martial law has been declared and enforced, it will be seen that "the moment martial law is withdrawn, all orders of the military, including sentences of imprisonment, which were intended to continue after the cessation of martial law, cease to have force and effect."⁽⁵⁷⁾ What was strange in the present case was that section 7 of the Martial Law (Indemnity) Ordinance No. II of 1953 not only validated "acts ordered or done in good faith for the

(54) Ibid, at p.842.

(55) Chapter 1.

(56) Md. Umar Khan v. The Crown, P.L.R. 1953 Lahore at p.849.

(57) Ibid, at p.841 - "And in our Constitution there is nothing enabling the military to step in and take over to the exclusion of civil power", at p.839.

purpose of maintaining or restoring order" but also kept alive "all sentences executed and orders of seizure or destruction of property made during the martial law period" even on the expiry of such period. (58) In discussing whether "this confirmatory provision conflicts with the principle that when martial law is withdrawn and civil power fully restored, all orders passed by the military must expire on such withdrawal" Muhammad Munir C.J. observed that there was no such confirmatory provision in England since the days of Edward III and also none such in Ireland or the colonies. On an interpretation of Section 7 of the Ordinance II of 1953 he concluded that as it referred to sentences of the kind in the present case, they would, therefore, remain effective unless the section was shown to be ultra vires.

(g) Suspension of the Constitution during Martial Rule

Refuting the arguments that the declaration of martial law and the passing of the Ordinance II of 1953 led to the suspension of the Constitution, Muhammad Munir C.J. said that the authority of the Government or the legislature had not ceased in the area under martial law. "Their authority to act, except to the extent that it is controlled by the martial law administrator, does not cease and it cannot at all be said that the sovereignty of the State is temporarily deposed from such area." (59) According to him suspension of constitutional guarantees was a different matter. Moreover, under the Government of India Act,

(58) Ibid, at p.849.

(59) Ibid, at p.857.

1935, still in force, "there are very few constitutional restrictions (60) on the legislature's power." But when he made such a wide statement that "in an emergency the rights of the legislature to legislate as to person and property of its citizens are supreme and any legislation passed by it touching the freedom of person or possession or enjoyment (61) of property, cannot be objected to on the ground of unconstitutionality", it can hardly be supported. The advocacy of the supremacy of the Constitution and not Parliament would have been appropriate in the context of Pakistan where the powers of the Legislature and the Executive were defined by a written Constitution.

4. The Constitutional Emergency in Pakistan and Assumption of Extraordinary Powers by the Executive

Pakistan came into existence as a result of the British Government's announcement of 3 June, 1947. Paragraph 4 stated that "while it was not intended to interrupt the work of the existing Constituent Assembly (that is, the Constituent Assembly which had come into being as a result of the Cabinet Mission's proposals) it was nevertheless clear that any Constitution framed by that Assembly could not apply to those parts of the country unwilling to accept it." Subsequent paragraphs provided methods by which certain provinces could join the existing or the new Constituent Assembly.

(60) Ibid, at p.857.

(61) Ibid, at p.858.

The Indian Independence Act, 1947, enacted by the United Kingdom Parliament legally transferred power to the two independent dominions. By 1950 the Constituent Assembly of India completed its work of framing a constitution for the country. But the Constituent Assembly of Pakistan failed to produce any constitution for Pakistan. On this ground the Governor-General of Pakistan dissolved it on 24 October, (62) 1954. The legality of his action was challenged by the President of the Constitution Assembly. The Sind Chief Court held that the (63) dissolution was invalid. On appeal to the Federal Court of Pakistan, the majority of the judges held that Section 223A of the Government of India Act, 1935 (which section was added to the Act in 1954), under

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- (62) The Proclamation declared as follows: "The Governor-General having considered the political crisis with which the country is faced has with deep regret come to the conclusion that the constitutional machinery has broken down. He has, therefore, decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function.

The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible.

Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted.

The security and stability of the country are of paramount importance. All personal, sectional and provincial interests must be subordinated to the supreme national interest."

- (63) Moulvi Tamizuddin Khan v. Federation of Pakistan, P.L.D. 1955
~~Ex 6xx246x~~ Sind 96.

which the present proceedings were started, was invalid inasmuch as it
(64)
had not received the assent of the Governor-General.

The main contention raged on the question whether the legal sovereignty of the Queen-in-Parliament passed to the Constituent Assembly alone or along with the Governor-General. On behalf of the Federation it was urged that the sovereignty rested with the Assembly and the Governor-General, so that the latter's assent was necessary for the validity of all laws, constitutional or otherwise. The view of the Constituent Assembly was that it was a sovereign body uncontrolled by any external agency and as such the constitutional laws enacted by it did not require the Governor-General's assent. The Federal Court expressed unwillingness to accept this contention and, therefore, held that his assent was necessary. Cornelius J., as he then was, dissented. In his opinion the constitutional practice followed for seven long years by the three government organs was clear. In accepting the legality of all such laws in force which did not receive the Governor-General's assent all of them had a share. It was too late in the day to deviate from the practice. Besides, there were also other indications which would undoubtedly show that the Constituent Assembly was a sovereign body.

The consequences that followed the decision were that as many as forty-four Acts of the Constituent Assembly passed without the

(64) Federation of Pakistan v. Moulvi Tamizuddin Khan, P.L.D. 1955 F.C. 240.

Governor-General's assent became invalid. The Governor-General attempted to validate and give retrospective effect to thirty-five Constitutional Acts by an Emergency Powers Ordinance, IX, of 1955, promulgated under Section 42 of the Government of India Act, 1935. (65)
(66)
In Usif Patel v. The Crown The Federal Court held that Section 42 did not enable the Governor-General to make by Ordinance any provision as to the constitution.

Muhammad Munir C.J. said: "This Court held in Mr. Tamizuddin Khan's case that the Constituent Assembly was not a sovereign body. But that did not mean that, if the Assembly was not a sovereign body, the Governor-General was. We took pains to explain at length that in that case the position of the Governor-General in Pakistan is that of a constitutional Head of the State, namely a position very similar to that occupied by the ~~Queen~~ King in the United Kingdom. That position, which was supported by Mr. Diplock, is now being repudiated by the learned Advocate-General and, on the ground of emergency, every kind of power is being claimed for the Head of the State. Let us say clearly, if we omitted to say so in the previous case, that under the

(65) Section 42 reads as follows: "(1) The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of Pakistan or any part thereof, and any ordinance so made shall have the like force of law as an Act passed by the Federal Legislature, but the power of making ordinances under this section is subject to the like restrictions as the power of the Federal Legislature to make laws, and any ordinance made under this section may be controlled or superseded by any such Act."

(66) P.I.D. 1955 F.C. 387.

Constitution Acts the Governor-General is possessed of no more powers than those that are given to him by those Acts." (67)

Referring to the extent of powers exercisable by the Governor-General in times of emergency, he went on to say:

"One of these powers is to promulgate Ordinances in cases of emergency but the limits within which and the checks subject to which he can exercise that power are clearly laid down in section 42 itself. On principle the power of the Governor-General to legislate by Ordinance is always subject to the control of the Federal Legislature and he cannot remove these controls merely by asserting that no Federal Legislature in law or in fact is in existence. No such position is contemplated by the Indian Independence Act, or the Government of India Act, 1935. Any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is under the Constitution Acts precluded from exercising those powers. The sooner this position is realised the better." (68)

To circumvent the difficulty created by this judgment the Governor-General issued a Proclamation and an Order for the summoning (69)

(67) Ibid, at p.396.

(68) Ibid, at p.396.

(69) The operative part of the Proclamation was as follows:
 "(1) The Governor-General assumes to himself until other provision is made by the Constituent Convention such powers as are necessary to validate and enforce laws needed to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the government of the country in its existing condition."

of a Constituent Convention. Further the Governor-General made a reference to the Federal Court for an advisory opinion under Section 213 of the Government Act.

(70)

On hearing the Special Reference No. I of 1955 the Federal Court held that the dissolution of the Constituent Assembly was valid and further held that the Governor-General could summon a new Constituent Assembly with the same powers as the old one and the invalid Acts could be revalidated by him as a temporary measure, subject to the approval of the new Constituent Assembly. The principle accepted by the Federal Court⁷¹ was that "in an emergency of this character the Governor-General had special powers under the common law which were not to be found in the Acts of 1935 and 1947." The departure from the decision in Usif Patel's case was made on two grounds. "First, in the Ordinance the validation of the invalid Acts was not stated to be a temporary measure pending validation by a Constituent Assembly; and, secondly,

(70) P.L.D. 1955 F.C. 435.

(71) Muhammad Munir C.J. said: "The disaster that stared the Governor-General in the face, consequent on the illegal manner in which the Constituent Assembly exercised its legislative authority, is apparent from the results described in the Reference as having followed from this Court's decision in Mr. Tamizuddin Khan's case and the subsequent case of Usif Patel. The Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of 16 April, 1955, declaring that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall be retrospectively enforceable is accordingly valid during the interim period, i.e. until the validity of these laws is decided upon by the new Constituent Assembly. Needless to say that since the validity of these laws during the interim period is founded on necessity, there should be no delay in calling the Constituent Assembly." At p.486.

there was no provision in the Ordinance for the summoning of a
 (72)
 Constituent Assembly."

5. The Law of Necessity

In the Reference made by the Governor-General under Section 213
 (73)
 of the Government of India Act, 1935, Muhammad Munir C.J. considered
 at length whether, in such an emergency as referred to in it, the Head
 of the State could "temporarily assume to himself legislative powers
 (74)
 with a view to preventing the State and society from dissolution."

At that moment no Legislature was functioning and State necessity
 demanded that laws which had become invalid should be immediately
 given retrospective validation. Was the Governor-General obliged to
 wait for a legal remedy or was he entitled "in the interests of the
 State temporarily to act outside the limits of the written constitution"?
 In other words, could he act on the principles contained in such maxims
 as id quod alias non est licitum, necessitas licitum facit, or salus
populi suprema lex, or salus reipublicae est suprema lex.

In the opinion of Muhammad Munir C.J. "the law of civil or
 State necessity is as much a part of the unwritten law as the law of

(72) Sir Ivor Jennings, Constitutional Problems in Pakistan, at p.48
 (1957).

(73) Special Reference No. I of 1955, P.L.D. 1955 F.C. 435.

(74) Ibid, at p.478.

military necessity." He found support from Cromwell's utterance:

"If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law",

(75)
and referred to a few English cases. It must, however, be mentioned that Cromwell was exercising dictatorial powers. The history of the long struggle between the King and Parliament is a record of the final triumph against the arbitrary exercise of powers by the Executive.

(76)
The case of Attorney-General v. De Keyser's Royal Hotel was also cited in support of the above proposition, but the decision embodied a contrary principle. It held that "when powers covered by this statute are exercised by the Crown, it must be presumed that they are so exercised under the statute", and, therefore, the Crown's prerogative was accordingly (77) curtailed. Even the necessity arising out of a World War could not enlarge the powers of the Crown when statutory limitations were imposed upon them. Opinions of some jurists were also quoted in support of the principle that what would otherwise be unlawful, necessity would make them legal.

Muhammad Munir C.J. compared the powers and responsibilities of the Head of the State during an extraordinary emergency to those of an Army Commander during Martial Law, because "the law of civil necessity and that of military necessity are both founded on a common

(75) In re an Arbitration (1915) 3 K.B. 676; Shipmoney Case, R. v. Hampden (1637) 3 St. Tr. 825; Bates's Case (1606) 2 St. Tr. 371.

(76) (1920) A.C. 508.

(77) Ibid, at p.554.

(78)
 principle." Of course some distinction existed. "The duty of an army commander arises where there is a revolt, insurrection or disturbance of the public order, but the principle which permits, and occasionally demands, the exercise of emergency powers is not limited to those cases and equally governs a situation where the Head of the State is required to act in a case of necessity when the Legislature is not being." (79)
 On the authority of the principle enunciated by Lord Mansfield in the proceedings against George Stratton and others, (80) Muhammad Munir C.J. expressed the opinion that "subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity being referable to an intention to preserve the constitution, the State

(78) Special Reference No. I of 1955, P.L.D. 1955 F.C. 436 at p.483.

(79) Ibid, at p.484.

(80) (1778) 21 Howell's St. Tr. 1046. The Proceedings were started on an information filed by His Majesty's Attorney-General for a misdemeanour in arresting, imprisoning and deposing Lord Pigot, Commander-in-Chief of the Forces in Fort St. George and President and Governor of the settlement of Madras. The defendants contended that Lord Pigot had violated the constitution of the government of Madras and that the defendants had acted under necessity in order to preserve the constitution. In his address to the jury Lord Mansfield said: "... to amount to a justification, there must appear imminent danger to the government and individuals; the mischief must be extreme, and such as would not admit a possibility of waiting for a legal remedy. That the safety of the government must well warrant the experiment ... The necessity will not justify going further than necessity obliges: for though compulsion takes away the criminality of the acts, which would otherwise be treason, yet it will not justify a man in acting farther than such necessity obliges him or continuing to act after the compulsion is removed," at p.1230.

(81)
 or the Society and to prevent it from dissolution." Further, since Lord Mansfield's address to the jury expressly referred to the right of a private person to act in necessity, "in the case of Head of the State justification to act must a fortiori be clearer and more imperative."⁽⁸²⁾

Cornelius J. dissented from the views taken by the majority and was of the opinion that the Governor-General had no more powers in an emergency than conferred upon him by the constitution. He found himself unable to agree with views which favoured a larger authority in a Governor, as would be evident from the following statement:

"There is no doubt that a Governor will always held to have had all the power necessary for meeting any emergency which may have required him to take immediate action for the safety of the Colony. If he acts in good faith and having regard to the circumstances reasonably, he will be held harmless."⁽⁸³⁾

Cornelius J. fully approved the criticism of the above dictum by Mr. Keith:

"This is doubtless unsound doctrine, if it suggests that there is any special privilege in the case of a Governor or that mere reasonable action in good faith will cover any act. Every member of the executive may violate in case of emergency ordinary laws, but the Governor, like every other officer, runs the risk of finding that a

(81) Special Reference No. I of 1955, P.L.D. 1955 F.C. 435 at 485.
 (82) Ibid, at p.485.
 (83) per Sir H. Jenkyns, British Rule and Jurisdiction Beyond the Seas, at p.103

Court of law may conclude that the emergency was not such as to justify his action despite its good faith and apparent reasonableness." (84)

Such opinion was unexceptionable especially when Pakistan was provided with a most elaborate constitution contained in the Indian Independence Act, 1947, and the Government of India Act, 1935. These instruments distributed all the powers of Government in detail among the several authorities of the Centre and the Provinces. Considering the history of the working of the Government of India Acts beginning (85) from 1915 Cornelius J thought that what Dr. Keith said generally with reference to the Governor of a Dominion was fairly true in relation to

- (84) A. Berridale Keith, Responsible Government in the Dominions.
 (85) Special Reference No. I of 1955, P.L.D. 1955 F.C. 435.

"This Constitution, which was well adapted to the requirements of a great country with a population of some 350 millions, was operated successfully for ten years before the Partition, some six of these years being covered by the period of the Second World War, in a most successful manner, without resort by the Chief Executive to any powers other than those expressly provided by the British Parliament in the Government of India Act and certain other statutory instruments of a temporary nature. Prior to the coming into operation of the Government of India Act, 1935, the country had been governed for some twenty-two years under the previous Constitution Act, viz. the Government of India Act, 1915, whose provisions differed from those of the 1935 Act in two main respects, viz. that powers were mainly concentrated in the hands of the Executive, and legislative institutions were as yet embryonic and were provided with only limited scope. Yet even in that earlier period, when responsibility for the safety and welfare of the State devolved so much more heavily upon the Executive heads at the Centre and in the Provinces, it was never found necessary to invoke any powers in relation to British India except such as were derived clearly from express statute", at p.

the Governor-General of Pakistan. "He possesses no special privilege to act in excess of the powers afforded to him by the written constitution, and by his Commission of appointment, and that he cannot affect to act as Viceroy or to assume that he possesses general sovereign power."⁽⁸⁶⁾

The only occasion when the Governor of a Dominion may be justified in breaking the law in the exercise of extraordinary powers is when it becomes necessary to declare martial law. He may do so in "certain other occasions when the requirement arose in relation to public order."⁽⁸⁷⁾

When such extraordinary powers are assumed, they are "generally confined to matters affecting the property and persons of individual subjects."⁽⁸⁸⁾

He then went on to say:

"The existence of an emergency, say a state of war or a large-scale disturbance, may justify the executive in making an order commandeering all private motor vehicles. Similar circumstances may justify entry by officers of the executive upon privately owned premises which are, in the eye of the ordinary law, inviolable. In a more stringent emergency, the services of members of the public may be requisitioned for the purposes of carrying out works or otherwise offering resistance to check a calamity or offering resistance to an enemy."⁽⁸⁹⁾

(86) Ibid, at p.498.

(87) Ibid, at p.511.

(88) Ibid, at p.511.

(89) Ibid, at p.511.

According to him this was the state of law in the United Kingdom and the countries of the Commonwealth. Referring to the United States of America Cornelius J. said that there also "the operation of the maxim 'necessity knows no law' is recognised but only in relation to matters falling within the police powers of the State."⁽⁹⁰⁾

As to the argument that "on the ground of emergency every kind of power is being claimed for the Head of the State", he said that the effect of the judgment in Usif Patel's case was that even under the situation contemplated by the Proclamation of 16 April 1955 "the Governor-General could not invoke any powers except such as were available to him under the constitutional instruments in force."⁽⁹¹⁾⁽⁹²⁾

No arguments showing sufficient justification for varying that finding were advanced in the Reference.

But, if the Governor-General were, besides being a mere constitutional head, also a political sovereign as the King of England, he might have claimed such powers as the latter was advised to exercise:

(i) in 1723, in relation to the colony of New Jersey in America, to determine the electoral right by prescribing the qualifications of

(90) Ibid, at p.511. Blackstone defined police powers as including "the due regulation and domestic order of the Kingdom whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations", quoted by Cornelius J. at p.511.

(91) P.L.D. 1955 F.C. 387.

(92) P.L.D. 1955 F.C. 435 at 515.

electors, and varying constituencies, in the absence of a local electoral law;

(ii) in 1747, in relation to the colony of New Hampshire in America, to increase the number of constituencies;

(iii) in 1690, by appointment of a Governor for Maryland, in America, in respect of which Lord Baltimore had incurred forfeiture of the charter held by him, in advance of the forfeiture being enforced; or

(iv) in 1752, in relation to the colony of Georgia in America, upon surrender of the charter, to authorise magistrates and other public officers by proclamation under the Great Seal, in advance of the establishment of a new system of administration.

Reference to the opinions of jurists and the facts and decisions of few cases all of which belonged "to periods when, and to territories (93) where, the power of the King was, in fact, supreme and undisputed," did not seem relevant. As Cornelius J. said:

"The records of these affairs are hardly the kind of scripture which one could reasonably expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people is sovereign. In the case of North America, the

(93) Ibid, at p.515.

territory was lost eventually to the British Crown through the maintenance of just such reactionary opinions as those which Senior Counsel for the Federation of Pakistan has been pleased to advance for the acceptance by the Court. And in the English case, the fate of the King, and the judges who delivered the opinion favouring absolute power in the King stands for all time as a warning against absolutism, and as a landmark in the struggle for the freedom and eventual
(94)
sovereignty of the people."

Muhammad Sharif J., in agreeing with the above views, said that the Governor-General was not competent to legislate and could not by his own act make valid laws which he could not otherwise enact, so far as constitutional matters were concerned. In the absence of authority for a contrary proposition and to circumvent this difficulty, recourse was had by Government counsel to such dicta as salus populi suprema lex and 'necessity makes lawful what is otherwise unlawful.' It was hardly possible to utilise them on the present occasion. As Muhammad Sharif J. said:

"These have been sometimes invoked in times of war or other national disaster to infringe private rights or commandeer private property, but we have not been referred to any authority or reported cases where, under the stress of circumstances created by some interpretation of law, these were extended to embrace changes in constitutional

(94) Ibid, at pp.515-516.

law. It might on occasions lead to dangerous consequences if in any real or supposed emergency of which the head of State alone must be the judge, the constitutional structure itself could be tampered with."⁽⁹⁵⁾

(95) Ibid, at p.519.

CHAPTER 11THE LAW OF MARTIAL RULE IN PAKISTAN (Continued)1. The Proclamation of 7 October 1958: The Abrogation of the Pakistan Constitution of 1956 and its reasons

On 7 October, 1958, Major-General Iskender Mirza, the President of Pakistan, made "a clean sweep" of the country's Constitution, government, assemblies and political parties. The abrogation of the two year old constitution was simultaneously followed by the handing of supreme power to General Muhammad Ayub Khan, the Commander-in-Chief, and the imposition of martial law throughout Pakistan. The President's Proclamation ran as follows:

"for the last two years, I have been watching, with the deepest anxiety, the ruthless struggle for power, corruption, the shameful exploitation of our simple, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends. There have been a few honourable exceptions. But being in a minority they have not been able to assert their influence in the affairs of the country.

These despicable activities have led to a dictatorship of the lowest order. Adventurers and exploiters have flourished to the detriment of the masses and are getting richer by their nefarious practices.

Despite my repeated endeavours, no serious attempt has been made to tackle the food crisis. Food has been a problem of life and death

for us in a country which should be really surplus. Agriculture and land administration have been made a hand maiden of politics so that in our present system of government no political party will be able to take any positive action to increase production. In East Pakistan, on the other hand, there is a well organised smuggling of food, medicines and other necessities of life. The masses there suffer due to the shortage so caused in and the consequent high prices of these commodities. Import of food has been a constant and serious drain on our foreign exchange earnings in the last few years, with the result that the Government is constrained to curtail the much needed internal development projects.

Some of our politicians have lately been talking of bloody revolution. Another type of adventurers among them think it fit to go to foreign countries and attempt direct alignment with them which can only be described as high treason.

The disgraceful scene enacted recently in the East Pakistan Assembly is known to all. I am told that such episodes were common occurrences in pre-Partition Bengal. Whether they were or not, it is certainly not a civilised mode of procedure. You do not raise the prestige of your country by beating the Speaker, killing the Deputy Speaker and desecrating the National Flag.

The mentality of the political parties has sunk so low that I am unable any longer to believe that elections will improve the present chaotic internal situation and enable us to form a strong and

stable Government capable of dealing with the innumerable and complex problems facing us today. We cannot get men from the moon. The same group of people who have brought Pakistan to the verge of ruination will rig the elections for their own ends. They will come back more revengeful, because I am sure that the elections will be contested, mainly, on personal, regional and sectarian basis. When they return, they will use the same methods which have made a tragic farce of democracy and are the main cause of the present widespread frustration in the country. However much the administration may try, I am convinced, judging by shifting loyalties and the ceaseless and unscrupulous scramble for office, that election will neither be free nor fair. They will not solve our difficulties. On the contrary, they are likely to create greater unhappiness and disappointments leading ultimately to a really bloody revolution. Recently, we had elections for the Karachi Municipal Corporation. Twenty per cent of the electorate exercised their votes, and out of these, about fifty per cent were bogus votes.

We hear threats and cries of civil disobedience in order to retain private volunteer organisations and to break up One Unit. These disruptive tendencies are a good indication of their patriotism and the length up to which politicians and adventurers are prepared to go to achieve their parochial aims.

Our foreign policy is subjected to unintelligent and irresponsible criticism, not for patriotic motives, but from selfish points of view, often by the very people who were responsible for it. We desire to

have friendly relations with all nations, but political adventurers try their best to create bad blood and misunderstanding between us and countries like the U.S.S.R., the U.A.R. and the Peoples' Republic of China. Against India, of course, they scream for war, knowing full well that they will be nowhere near the firing line. In no country in the world do political parties treat foreign policy in the manner it is done in Pakistan. To dispel the confusion so caused, I categorically reiterate that we shall continue to follow a policy which our interests and geography demand that we shall honour all our international commitments, which as is well-known we have undertaken to safeguard the security of Pakistan and, as a peace-loving nation, to play our part in averting the danger of war from this troubled world.

For the last three years, I have been doing my utmost to work the Constitution in a democratic way. I have laboured to bring about coalition after coalition, hoping that it would stabilise the administration and that the affairs of the country would be run in the interests of the masses. My detractors, in their dishonest ways, have on every opportunity called these attempts as Palace intrigues. It has become fashionable to put all the blame on the President. A wit said the other day, "If it rains too much it is the fault of the President, and if it does not rain it is the fault of the President." If only I alone was concerned I would go on taking these fulminations with the contempt they deserve. But the intention of these traitors

and unpatriotic elements is to destroy the prestige of Pakistan and the Government by attacking the Head of the State. They have succeeded to a great extent, and if this state of affairs is allowed to go on, they will achieve their ultimate purposes.

My appraisal of the internal situation has led me to believe that a vast majority of the people no longer have any confidence in the present system of Government and are getting more and more disillusioned and disappointed and are becoming dangerously resentful of the manner in which they are exploited. Their resentment and bitterness are justifiable. The leaders have not been able to render them the service they deserve and have failed to prove themselves worthy of the confidence the masses had reposed in them.

The Constitution which was brought into being on 23rd March, 1956, and after so many tribulations, is unworkable. It is full of dangerous compromises that Pakistan will soon disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. Then it is my intention to collect a number of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people.

It is said that the Constitution is sacred. But more sacred than the Constitution or anything else is the country and the welfare

and happiness of its people. As Head of the State, my foremost duty before my God and the people is the integrity of Pakistan. It is seriously threatened by the tuthlessness of traitors and political adventurers, whose selfishness, thirst for power and unpatriotic conduct cannot be restrained by a Government set up under the present system. Nor can I any longer remain a spectator of activities designed to destroy the country. After deep and anxious thought, I have come to the regrettable conclusion that I would be failing in my duty if I did not take steps, which in my opinion are inescapable in present conditions, to save Pakistan from complete disruption. I have, therefore, decided:-

(a) the Constitution will be abrogated,

(b) the Central and Provincial Governments will be dismissed with immediate effect,

(c) the National Parliament and Provincial Assemblies will be dissolved,

(d) all political parties will be abolished,

(e) until alternative arrangements are made, Pakistan will come under Martial Law. I hereby appoint General Muhammad Ayub Khan, Commander-in-Chief, Pakistan Army, as the Chief Martial Law Administrator and place all the armed forces of Pakistan under his command.

To the valiant Armed Forces I have to say that "having been closely associated with them since the very inception of Pakistan, I

have learnt to admire their patriotism and loyalty. I am putting a great strain on them. I fully realise this but I ask you officers and men of the Armed Forces on your services depends the future existence of Pakistan as an independent Nation and a bastion in these parts of the Free World. Do your job without fear or favour and may God help you.'

To the people of Pakistan, I talk as a brother and fellow compatriot. Present action has been taken with the utmost regret, but I have had to do it in the interests of the country and the masses finer men than whom it is difficult to imagine. To the patriots and the law-abiding, I promise you will be happier and freer. The political adventurers, the smugglers, the black marketeers, the hoarders will be unhappy and their activities will be severely restricted. As for the traitors, they had better flee the country if they can and while the going is good."⁽¹⁾

2. Its Justification and Effects

It is true that, in announcing this bold and outright condemnation of "the politicians" and "the system", "no stronger words could be used by a head of State".⁽²⁾ Still, the question might be, and as was, asked whether President Mirza was absolved of all responsibility for the

(1) P.L.D. 1958 Central Statutes 577.

(2) The Times, London, 9 October, 1958.

state of affairs he so loudly and vociferously denounced. It would seem natural to inquire what was he doing all the time. Could he claim that he did not suffer from the limitations which marred the general political behaviour of the popular leaders? "Unfortunately General Mirza is not a General de Gaulle; he himself must bear part of the blame for the political degeneration he deplores. He is far from innocent of party politics (the Republican party owed its existence largely to him); he played a significant part in the dismissal of one of the most stable Governments Pakistan has had - that of Mr. Suhrawardy. And he is certainly as ambitious as the general run of politicians, though less selfishly." ⁽³⁾ Excepting his own assertions, whose truth or wisdom need not concern us, there is no evidence of his difference of opinion with them. On such important issues silence can never be a convincing proof of one's ability, neither does it go a long way to establish his sincerity. His vehement sentiments against everybody and everything did not contain in them any constructive approach to the solution of the many ills of Pakistan. Before resorting to such drastic remedy as was proclaimed by him, would it not unmistakably show his faith in and loyalty to the Constitution if he first exhausted all the resources provided by it? After all, he took a solemn oath to preserve, protect and defend the Constitution.

(3) The (Manchester) Guardian, 9 October, 1958.

Be that as it may, concerned as we are mainly with the legal and constitutional significance of the measures adopted we shall consider those aspects of the New Rule relevant from that viewpoint. The immediate result of the Proclamation abrogating the Constitution was the dissolution of the Assemblies, both National and Provincial, dismissal of Governments, both at the Centre and the Provinces and the assumption of all necessary powers for the governance of the country. Obviously, the unchallenged exercise of such powers required the imposition of martial law, which here only meant notice of a determination not to be hampered by any sort of opposition or criticism against his rule. This was evident from the liquidation of all existing political parties.

Gradually it was made clear that the proclamation of martial law was made not on traditional grounds (there was no sign of disturbance, nor any reasonable apprehension of it, excepting perhaps the awareness that these drastic steps might be challenged before the court of law), neither was it meant to be a temporary affair. What was it then? Would it be proper to call such assumption of powers by an expression which has altogether different meaning and content? Even the instance of martial law in the sense of military government for a fairly long period is rare in the Commonwealth and America. It will be our endeavour to find the true nature of the Rule introduced by President Mirza's Proclamation of 7 October, 1958, and seek its meaning and justification with reference to the study of martial rule in different countries, which we have previously made.

Having thus briefly considered the outcome of President Mirza's Proclamation but before we proceed to examine closely the features of the New Regime, it would perhaps not be out of place to discuss the validity of the argument which was sought to justify the scrapping of parliamentary democracy in Pakistan. For it was the main contention of Iskender Mirza, ever since he came into prominence, that parliamentary democracy was not suited to Pakistan. (4) Even after he was sworn-in as the first President of Pakistan under the Constitution of 1956 which introduced parliamentary government in the country, he was not reconciled to the idea of having such government.

3. Causes of the Failure of Parliamentary Government in Pakistan

Since both achievements and failure, unique and colossal in their nature, mark the history of the people of Pakistan for more than a decade, it is fruitful to discuss some of the causes which led to the virtual scrapping of the Constitution and the negation of democracy in this country. No simple explanation would be satisfactory. To discover

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- (4) He talked of "controlled democracy". H. Feldman, A Constitution for Pakistan, at pp.66-67 (1955). Also Professor Alan Gledhill's The Constitution of Pakistan at p.77 (1957). In an interview with the Special Correspondent of The Daily Telegraph, London, 15 October, 1958, President Mirza said: "we have got to have some sort of representative Parliament which at the same time can be restricted. When I used the words "controlled democracy" I was cursed from one end of the world to the other. But I think we should have a democracy with a provision in the constitution to right the situation when democracy runs off the rails."

the reasons for such failure one has to probe as much the dominant national traits as to examine the social, political and economic conditions prevailing in the country.

Before considering its failure it may be necessary to inquire what is meant by "parliamentary government." Here some difficulty is bound to arise, for parliamentary government, as has been said, "is not a static piece of constitutional machinery but a dynamic process" and further, any definition would merely "tend to be about the formal machinery of government than about the informal spirit and customs which form the lubricant that enables the machine to operate."⁽⁵⁾

Without attempting to define it, some of the most salient features of parliamentary government may therefore be profitably enumerated:

1. The Executive must be responsible to and dismissible by the Legislature.
2. Laws are to be enacted by the Legislature which must be composed of members elected by the citizens at regular intervals.
3. Judges must be independent.

(5) Problems of Parliamentary Government in Colonies: A Report prepared by the Hansard Society, 1953, at p.2. Again "democracy is not merely a matter of political institutions, but of the spirit in which they are worked; democracy must arise from within, and cannot be imposed - though it may be helped or hindered - from without ... Unless the true democratic temper is present, the most beautifully devised political or economic machinery will result in nothing but slavery." Education for Citizenship in Africa: A Report of the British Advisory Committee on Education, 1948.

4. The Rule of Law must prevail; no man should be punishable without trial in an ordinary court of law and except for a distinct breach of a properly enacted law; no man should be above the law.

5. The fundamental rights of the citizens must be guaranteed.

6. The elections must be free and impartial.

Apparently some but not all of these incidents characterised the British Indian Government before the transfer of power to the newly created dominions of India and Pakistan. We have already briefly considered the Government of India Act, 1935, and the constitutional history of Pakistan from 1947 to 1958 when parliamentary government was suspended by the Presidential Proclamation on 7th October. We have seen that the Constitution of 1956 embodied the principles of parliamentary government. Most of the members of the Constituent Assembly who took an active part in framing the Constitution were so much steeped in the ideas of parliamentary system in the United Kingdom that they did not pause to consider whether in view of the geographical distance between the two wings of Pakistan and other factors such a system could be reasonably expected to work. ⁽⁶⁾ But they not only assumed that a democratic constitution containing familiar features would operate quite successfully, they perhaps thought that "a democratic State based on Islamic principles of social justice" would go a long way to satisfy the national aspirations. In spite of

(6) Sir Ivor Jennings, The Approach to Self-Government, 1957, at pp.13 and 19.

their indifference to the possibility of future conflict between Islamic principles and democratic concepts, the Preamble to the Constitution of 1956 recorded some of the common aspirations of the people -

"Wherein the State should exercise its powers and authority through the chosen representatives of the people;

"Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam should be fully observed;

"Wherein the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and Sunnah;

"Wherein adequate provision should be made for the minorities freely to profess and practise their religion and develop their culture;

"Wherein should be guaranteed fundamental rights including rights such as equality of status and of opportunity, equality before law, freedom of thought, expression, belief, faith, worship and association, and social, economic and political justice, subject to law and public morality;

"Wherein adequate provision should be made to safeguard the legitimate interests of minorities and backward and depressed classes;

"Wherein the independence of the Judiciary should be fully secured

"So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make

their full contribution towards international peace and the progress and happiness of humanity."

Mention must be made of two other facts. First, the Constitution of 1956 declared Pakistan to be "The Islamic Republic of Pakistan," and also on 2 March, 1956, the Governor-General of Pakistan signed a bill to make the country an Islamic Republic. Secondly, almost simultaneously, the Constituent Assembly decided that Pakistan would remain within the Commonwealth. The resolution for continued membership of the Commonwealth which was supported by Mr. Suhrawardy, the leader of the Opposition, though members of his party absented themselves from the House, was passed by forty-two votes to two. Mr. Muhammad Ali, the Prime Minister, said: "We accept the Queen, not as our Sovereign, but as the symbol of the free association of the Commonwealth ... As a Republic we are completely free and independent, and we are also free to be members of the Commonwealth as long as we wish."⁽⁷⁾

The question therefore necessarily arises why in spite of declarations of such seemingly admirable and more or less attainable democratic principles and the expressed desire to associate with the other democratic countries of the Commonwealth, the Constitution of Pakistan had, within two and a half years of its enactment, to be abrogated. Not only that, it would also be important to inquire why, along with the abrogation of the Constitution, the people of Pakistan

(7) The Times, London, 3 March, 1956.

had to be deprived of Parliamentary democracy which is still functioning elsewhere in the Commonwealth. In this connection other questions would also be raised, such as why martial law had to be introduced throughout the country, why the fundamental rights had to be suspended, why political parties were dissolved and, most important of all, why the jurisdiction of the Courts was curtailed and why the Executive has assumed the entire legislative powers and partial judicial powers of the State.

Our attempt shall be directed to find out the answers to these questions, but as they are all inter-connected the reasons advanced may seem to overlap. One might even confine the entire discussion to a few summary observations such as that democracy, as known in the West, is foreign to the genius of the Eastern peoples, or that the leaders who were entrusted with the governments of the country since its inception did not sincerely believe in democratic ideals. One might also contend that the accusations of inefficiency made in President Mirza's Proclamation of 7th October were the real causes of the failure. But to stop there, without any attempt at further analysis, would be to oversimplify a very complex problem. It may, no doubt, be true that all of the above explanations contain some truth, but none of them, it is submitted, gives a true diagnosis of the social and political evils that required such a drastic remedy. Some of the causes are quite common for, in most of the countries in South Asia today where Parliamentary democracy has suffered setbacks, they have

also been exhibited. But in Pakistan where the democratic process has, though temporarily, been discarded, some factors are novel. We shall now consider these in turn.

As far back as 1924 an utterance which seems to have been justifiably, though quite cynically, made is still representative of a widely ~~popular~~ popular belief that Western type of democracy is unworkable in Asia. "You can no more expect the representative institutions to flourish in their proper form in India than you can expect hot-house flowers to blossom in the icy cold of the North." ⁽⁸⁾ Such facile expressions do not help to solve the problem; they merely tend to forestall inquiry. They do not explain why democratic ideals are unattainable in the East and, if really so, what ideals should be substituted and followed, or even consider whether any genuine attempt has been so far made to build a democratic society on the Western model.

It is true that the concept of democracy as "government of the people, by the people and for the people" ⁽⁹⁾ is the result of the social and philosophical beliefs of the people of Western Europe and that the evolution of their social and economic structure contributed greatly to the formulation as well as realisation of the democratic principles

(8) The statement was made by A. K. Fazlul Huq, quoted in R. Coupland's The Constitutional Problem in India, 1944.

(9) In his speech at Gettysburg during the American ~~War~~ Civil War, Abraham Lincoln said that "this nation, under God, shall have a new birth of freedom, and government of the people, by the people and for the people shall not perish from the earth."

and assumptions. To reach the present state of development they needed not only a few generations but several centuries. With them democracy is now not merely a political idea, but something much more than this. It is a way of life or an instinct or an attitude of mind. The Christian morality may underlie and nourish the sentiment, but the institutions and methods gradually built up on the democratic basis manifest an adherence to the secular ideal.

The expression of the doubt that parliamentary government as known in the West may not, therefore, be suitable for Pakistan "whose background, traditions, and social structure may provide infertile
(10)
soil for the growth of such a tender plant" is partially true.

"Democratic practice as it is followed in the West requires a high sense of public responsibility and the acceptance of certain fundamental rules and values. These have hardly been as yet developed in Pakistan as in other Asian countries where also the new democratic institutions have not yet acquired the same content as they have in
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the West." Warnings have also been given against the attempt to introduce a system of government for a people who is not yet ready to accept it. "Institutions and methods in order to command success and promote the happiness and welfare of the people, must be deep-rooted

(10) Problems of Parliamentary Government in Colonies: A Report prepared by the Hansard Society, 1953, at p.4.

(11) G. W. Chowdhury, Parliamentary Government in Pakistan in Parliamentary Affairs, vol. XI, 1957-58, at p.90.

in their traditions and prejudices ... A slavish adherence to any particular type (of administration), however successful it may have proved elsewhere, may, if unadapted to local environment, be as ill-suited and as foreign to its conceptions as direct British rule would be."⁽¹²⁾

Yet in 1947 the logic of the situation demanded that power should be transferred to the people of Pakistan, who were left to choose whatever form of government they liked. Though the validity of the above criticisms needed recognition, everyone seemed to have accepted the ideals of democracy. Not only at the moment of national exuberance caused by the grant of independence, which led to forgetfulness on this ⁽¹³⁾ issue, but ever since "democracy as an ideal has not been seriously challenged in Pakistan either from the extreme right or the extreme left." There was, however, some misunderstanding in certain circles about the nature and function of a modern State, but their demand based on Islamic religious conceptions, was not favoured by the leaders of public opinion, though, in deference to the wishes of the Ulema, the Constitution of 1956 was sprinkled with some Islamic principles.

Beginning with the demand for Pakistan and through the recent years after its creation, the political leaders here as elsewhere

(12) Sir F. D. Lugard, The Dual Mandate in British Tropical Africa, 1922.

(13) G. W. Chowdhury, Failure of Parliamentary Democracy in Pakistan, Parliamentary Affairs, vol. XII, 1958-59 at p.66.

sought "the extension of their political rights through the development
 of institutions based on the British model."⁽¹⁴⁾ While the Constituent
 Assemblies of Pakistan were engaged in drawing a Constitution for the
 country, not only the leaders, who were mostly lawyers, imbued with the
 ideas of British Constitutional law, were thinking "in British terms"
 and asking "for responsible government", but also the "people of
 Pakistan were so familiar with the British Constitution that any
 fundamental departure from it would be regarded with profound suspicion."⁽¹⁵⁾
 Obviously, as has been suggested by Sir Ivor Jennings, there were "other
 forms of self-government, such as that which operates in the United
 States",⁽¹⁶⁾ and an analysis was also made of the constitutions of various
 countries but "in the end, however, what may be called the British
 prejudices of the lawyers proved to be dominant."⁽¹⁷⁾

Thus, when neither the people nor the leaders showed any
 aversion (with the solitary exception of Major-General Iskander Mirza
 who advocated what he termed as "controlled democracy" and expressed
 preference for a presidential form of government) for democracy in
 general and parliamentary government in particular, it arouses interest
 as to why both were superseded before a chance was given to work them.

(14) Problems of Parliamentary Government in Colonies: A Report
 prepared by the Hansard Society, 1953, at p.5.

(15) Sir Ivor Jennings, The Approach to Self-Government, 1956, at
 pp. 13 and 19.

(16) Ibid, at p.13.

(17) Ibid, at p.16.

Some transparent and immediate causes such as have been referred to with great vehemence in the Presidential Proclamation of 7th October, 1958, are oft-repeated and easily discernible. Besides them, there are other important reasons for the failure of parliamentary government in Pakistan which require consideration. Among these the first and foremost is the lamentable lack of awareness of rights which made liberty quite meaningless though independence was a reality. It seemed that after they had achieved their object (of course, not shedding much "blood, sweat and tears") they felt relieved and avoided taking new responsibilities in order to fulfil the conditions necessary for a greater success. It appeared, or at least was made to appear, that there was no task of importance demanding attention, since the homeland was theirs and the government would be run by their own men. Some such complacency and self-satisfaction as expressed in the poetic utterance "God's in his heaven; all's right with the world" marked the general behaviour of the people and the leaders alike. The fundamental mistake was perhaps the easy assumption which led everyone to believe that government business would go on as before, if not more efficiently, at least no worse than under British rule in undivided India. The politicians failed to realise that great difficulties of every sort would dog their steps after the departure of the personnel running the previous government. None could deny, however, that though the

(18) "Everybody in a nationalist movement assumes that government is a simple art which can be learned in a morning." Sir Ivor Jennings, Problems of the New Commonwealth, at p.30 (1959).

government of yesterday was hardly democratic, it was nevertheless enlightened and efficient. What the successor government of a newly created nation needed most at this hour was a fresh sense of direction and an understanding of the steps required to ensure efficiency in the most complex machinery necessary in a parliamentary form of government. Unfortunately there was no leader, after the passing of the two founding fathers, with sufficient ability to meet the new situation.

This indifference to the need to evolve a new sense of purpose in the changed circumstances and the failure to acquire more detailed knowledge of the technique of parliamentary government, though inexcusable, is explained by the rapidity of constitutional development in the Indo-Pakistan sub-continent. While the older members of the Commonwealth are still functioning under their respective Constitution Acts, enacted by the British Parliament, Pakistan, like other newer members, got full freedom after a very brief experience of parliamentary government under the Government of India Act, 1935; gradual development and political experience which bring a mature outlook are not characteristic features of political evolution in Pakistan. To unite on the slogan for independence was one thing; to understand the full implications it involved was, however, completely different. Nobody would deny that to acquire a full understanding of the democratic process required time. As has been aptly remarked, "it is impossible to expect that colonial politicians will develop overnight the traditions which Britain has accumulated through

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centuries."

At the same time, it would seem that the leaders managed to forget the lessons of history. They assumed and quite wrongly, as later events proved, that self-government implied good government (20) and self-government meant "independence from alien control." They should have rather recognised that "political independence and democratic (21) self-government are not the same thing." For it may be that "a colony may become independent of imperial authority, only to fall under the sway of local demagogues or tyrants, or become disturbed by internal disorder or insurrection which the government cannot (22) control."

It is, therefore, necessary to consider what are the essentials for the proper functioning of a democratic parliamentary government which went unheeded in Pakistan and resulted in its dismal failure.

Starting with the proposition that "the business of the govern- (23) ment is not very different from any other business", the prime consideration for those responsible for running a parliamentary government is that they must have faith in democratic ideals and show their willingness to make necessary sacrifices to attain the object. Apart from outside attack, the newly-created democracies are subject

(19) Sir Ivor Jennings, The Approach to Self-Government, 1956, at p.156.

(20) Problems of Parliamentary Government in Colonies: A Report prepared by the Hansard Society, 1953, at p.19.

(21) Ibid.

(22) Ibid.

(23) Sir Ivor Jennings, The Approach to Self-Government, 1956, at p.151.

to insidious pressure from within. Referring to this sort of phenomenon, Sir William Slim, the Governor-General of Australia, recently said:

"I have watched in several countries, even in one or two of our own family, this attack from within. It has sometimes, temporarily at least, had success. Where it has, parliamentarians who have been so abruptly swept aside have only themselves to blame. They fell into two cardinal errors. First, they allowed themselves to become cynical in their hearts, to develop a secret contempt for the people they represent. That feeling undermines all proper human relationship and is the attitude of the dictator. Secondly by their behaviour, by their lack of integrity in public and private life, they have given ammunition to those, whether in the Press or elsewhere, who would attack parliamentary government. Like every other human institution, parliament is no better and no worse than the men and women who compose it."⁽²⁴⁾

It would appear that the political leaders in Pakistan were not only ignorant of these principles but unmistakably showed their unwillingness to learn from mistakes or pay sufficient attention to⁽²⁵⁾ the warning pronounced.

(24) In his opening address to the conference of the Commonwealth Parliamentary Association held at Canberra on 2 November, 1959. The Times, London, 3 November, 1959.

(25) Signs of contempt for democratic principles are evident from the failure to frame a constitution for the country before nine years elapsed, the reluctance to hold general elections, the treatment of the political opponents and the disregard of well-known conventions and usages. Also, ironically enough, the man who had no faith in parliamentary government and made no secret of the fact

It would be a mistake to suppose that the members of the ruling party were alone to blame; the selfish lack of regard for constitutional principles was equally exhibited by the parties in opposition. Again, intrigue among the members of the party in power itself found overt expression in their conduct, resulting in the irreparable loss of

was allowed to become the first President of Pakistan under the Constitution of 1956 and entrusted with the responsibility to work it successfully. K. J. Newman, Pakistan's Preventive Autocracy and its Causes, Pacific Affairs, at p.28 (1959).

On the dissolution of the First Constituent Assembly of Pakistan, cases were heard before the Federal Court of Pakistan in which severe judicial remarks were made against the political behaviour of the members of the previous government. But, as subsequent events proved, members of the Second Constituent Assembly followed the same pattern of conduct as their predecessors. G. W. Choudhury, Failure of Parliamentary Government in Pakistan, Parliamentary Affairs, Vol. XII (1958-59).

- (26) The absence of any protest by the opposition elements against the action of Mr. Ghulam Ahmad, the Governor-General of Pakistan, in dismissing Khwaja Nazimuddin, the Prime Minister of Pakistan, in May, 1953, immediately after he passed the National Budget, shows party and not parliamentary spirit. Equally unfortunate was the welcome accorded to Mr. Ghulam Ahmad when he, in order to frustrate the attempt of the First Constituent Assembly to control his powers by amending sections 9, 10, 10A and 10B of the Government of India Act, 1935, dissolved the Assembly. Again, a couple of months before the abrogation of the Pakistan Constitution in October, 1958, the members of the opposition groups in the East Pakistan Legislative Assembly, while showing opposition, more physical than constitutional, managed to inflict a fatal wound on the Speaker of the House.
- (27) It would not have been possible for Mr. Ghulam Muhammad, the Governor-General of Pakistan, either to dismiss Khwaja Nazimuddin when apparently enjoying the confidence of the majority in the Constituent Assembly or dissolve the Assembly itself in October, 1954, if some of the members of the ruling party were not co-operating with him. As has been said about his action in dissolving the Constituent Assembly: "The Governor-General was able to behave in this manner because a group in the cabinet was in league with him, making it difficult for the Prime Minister to take a strong line. The behaviour of this group was as subversive of democratic

democratic values.

Due to this indifference to and ignorance of the democratic process "the business of government" also suffered in other respects. The success of the parliamentary system depends on the existence of other parties. In Pakistan the Muslim League, which claimed to have created a separate homeland for the Muslims, continued to dominate till the election in East Pakistan in 1954 practically wiped it out. Even then no well-defined parties were organised to replace a single dominant party, but the mushroom growth of parties indicated that Pakistan "would not have two strong parties, as in Britain, nor one strong party with a variety of opposition groups, as in India, but a handful of competing groups." (28) Moreover, whatever parties emerged to fill the vacuum, they showed little enthusiasm in any sound programme (29) and consistent political action. This was no less due to their

conventions as the actions of the Governor-General." G. W. Choudhury, Parliamentary Government in Pakistan, Parliamentary Affairs, Vol. XI, at p.86 (1957-58). When, on the issue of one unit in West Pakistan, the Republican Party refused to support Mr. Suhrawardy, the Prime Minister, the latter advised the President Iskander Mirza to summon the National Assembly. The President refused and Mr. Surawardy had to resign. "The episode constitutes a doubtful chapter in the parliamentary system in Pakistan." G. W. Choudhury, Failure of Parliamentary Government in Pakistan, Parliamentary Affairs, Vol. XII, at p.64 (1958-59).

(28) Sir Ivor Jennings, The Approach to Self-Government, at p.18 (1956).

(29) G. W. Choudhury, The East Pakistan Political Scene, 1955-57, Pacific Affairs at p.320 (1957).

inexperience as political parties, for which, again, the Muslim League which "by taking credit for the establishment of Pakistan, took care that no alternative party arose to challenge their position" ⁽³⁰⁾ was to blame. This attitude on the part of the ruling party, besides violating the basis of a parliamentary system, denied the opportunity to learn through trial and error. The tendency to get rid of opponents and run a single party may have been caused by blind party spirit, but it could not generate faith in democratic ideals to which it paid lip-service. If the followers of the Muslim League cared to study the experience of those people who make a success of a parliamentary system (as recorded in the following passage) they would have been conscious that some factor was being left out of account:

"We do not regard the Government, any Government, as actuated purely by party spirit. We tacitly assume the existence of a counter-balancing factor - call it the "parliamentary spirit." "Parliamentary spirit" is by no means incompatible with "party spirit" - in our system it includes it. For centuries party has been the dynamic, and also the organizing agency in Parliament, and without party Parliament would fall into impotence and anarchy. But the parliamentary spirit does put a limit to the indulgence of party spirit. In a parliamentary system no party can be completely self-centred. It instinctively avoids doing anything which would destroy the parliamentary system or seriously

(30) Khalid B. Sayeed, The Political Role of Pakistan's Civil Service, Pacific Affairs, at p.133 (1958).

impede its working. It must at least tolerate the existence of other parties, let the electors vote for them if they wish, and leave them free to express their views in the country and in Parliament." (31)

It is perhaps too much to expect that the political leadership of the Muslim League could offer this. The little experience that the politicians had gathered of the process of government was learned "by running of a great political party in opposition to British rule" and part of their success was due to participation in such a party, but even then the democratic process can hardly be fully understood unless they join the deliberations and activities in the Legislature. (32) The short and limited nature of such experience made possible under the Government of India Act, 1935, was not at all adequate to meet the new situation created by independence. Moreover, by its composition, aims and objects, the Muslim League did not resemble any of the political parties in Britain or U.S.A. (33) Like the Indian National Congress it included members of all shades of opinion and interest who had sunk their differences to achieve freedom from foreign control. On realising the changed circumstances, the leaders of the Muslim League should either have dissolved the party or reorganised it on a new basis, leaving scope for the growth of responsible opposition parties.

(31) Sir Gilbert Campion, Developments in the Parliamentary System Since 1918, British Government Since 1918, at p.18 (1950).

(32) Sir Ivor Jennings, Problems of the New Commonwealth, at p.30 (1959).

(33) Sir Ivor Jennings, The Approach to Self-Government, at p.10 (1956).

The successful conduct of the business of government also requires that there should be an honest, impartial and highly-skilled public service, because without it self-government is quite unthinkable. Ministers are supposed to take decisions; it is the public service which can implement them. It is hardly necessary to say that without such implementation the system itself may be called into question. Advocating a strong civil service does not imply complete confidence in it. After all the civil servants have their own limitations.

Though Pakistan suffered from a dearth of able civil servants,

(34) Ibid, at p.151.

(35) Sydney D. Bailey, Parliamentary Government in Southern Asia, at p.85 (1953).

(36) Harold J. Laski, Reflections on the Constitution, at pp.11-12 (1951). Referring to "the little officials" who "are not only greedy for power" but "have a habit of strangling themselves in their own red tape", Laski said: "They compose complicated regulations in a style no one, not even themselves, can understand. They do everything with painful slowness, and with a relentless search for the routine of uniformity. They lack the initiative and the directness of business men. They make irritating rules which interfere, as in industry and commerce, with practical affairs of which they have no first-hand experience. They make, only too often, a 'theoretical' approach to a problem laid before them ... They become fixed, at an early stage of life, in a traditional way of doing things, so that their habits fail to get adjusted to the ever-changing pattern of the outside world."

(37) "At the time of partition the civil service of Pakistan, formed from the former Indian Civil Service and Indian Political Service, consisted of a little over a hundred officers. One of the most serious handicaps that Pakistan suffered, as compared with India, was that there were hardly any officers or sufficient status and experience to act as permanent heads of the new ministries. In the entire Interim Government of India on the eve of partition there was not one Muslim officer of the rank of Secretary. There were only four

it is surprising to see "how the civil servants have captured the apex of the pyramid" if the Government of Pakistan may be compared to a pyramid. Even before parliamentary government ceased to exist in Pakistan the civil servants were playing a "more powerful role than that of their imperial predecessors." Conflict between the elected representatives entrusted with the government of the country and the permanent officials did not escape the notice of foreign commentators. Thus, as early as 1955, it was observed: "The political complexion of Pakistan in the future will be largely determined by the extent to which these British-trained senior administrators and army officers consider that they are the only ones qualified to control the evolution of the country's institutions." Such extent, as is well-known, has been finally demonstrated. It may not be inappropriate to say that "to some extent Pakistan's parliamentary leaders acquiesced in the gradual assumption of power by army and bureaucracy," but it may not also be disputed that parliamentary crisis in Pakistan was accelerated

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officers of the rank of Joint Secretaries. Many of these deficiencies were made good by quick promotions of the available officers and also by hiring British officers on a contract basis." Khalid B. Sayeed, The Political Role of Pakistan's Civil Service, Pacific Affairs, at p.137 (1958).

(38) Ibid, at p.137.

(39) Ibid, at p.131.

(40) The Observer, London, 4 September, 1955.

(41) K. J. Newman, Pakistan's Preventive Autocracy and Its Causes, Pacific Affairs, at p.31 (1959).

by the impatience and over-ambition of the civil servants who proved themselves no less politically minded than the politicians. (42)

Apart from these considerations of the internal working of parliamentary government, some other requisites for its success may also be mentioned. Foremost among them is the participation of the citizens in government and administration of the country. This may start "with the simple act of recording a vote in elections, but it does not end there." (43) The citizens must not feel that vast differences exist between them and "the political elite or favoured bureaucracy who have a monopoly of the business of government". (44) They must have access to important impartial information. At the same time the need to educate them must be immediately recognised. Without universal education, it would be futile to expect from them mature judgment when they only vote at widely spaced intervals. Widespread illiteracy is a serious impediment to the successful development of parliamentary institutions. As has been aptly said, "The fact that a large proportion of men, and a larger proportion of women, in the four countries

(42) Sydney D. Bailey, Parliamentary Government in Southern Asia, at p.86 (1953).

(43) How precarious the position of the Prime Minister of Pakistan became some years before the post was abolished is evident from the following remark of Mr. H. S. Surawardy in the Constituent Assembly of Pakistan: "So, Sir, to be the Prime Minister of Pakistan which has been held by certain honourable gentlemen who have been turned out, taken by the ears and thrown out, as it suited the coterie, is not a matter of very great honour." Quoted in The Political Role of Pakistan's Civil Service, Pacific Affairs, at p.137 (1958).

(44) Ibid, at p.86.

(India, Pakistan, Burma and Ceylon) are illiterate or semi-illiterate (45) is a greater handicap than is always acknowledged." But it does not follow that, because the majority of the people are still illiterate, democracy must be denied them, even temporarily. The peoples who compelled King John to sign Magna Carta in 1215, or who caused the French Revolution on the cry of 'Liberty, Equality and Fraternity', or even who made the American Congress enact the Bill of Rights lived before the age of universal education. It is no wonder they knew that the democratic process can only be learned in a democratic (46) regime.

With the problem of educating the masses is connected the still greater problem of improving the education of the new leaders "who

(45) Ibid, at p.86.

(46) If such assertions that "some undeveloped countries have to learn democracy, and until they do so they have to be controlled" (made by Major-General Iskander Mirza, Pakistan's Minister of Interior, as he then, was, The Times, London, 30 October, 1954) meant a progressive realisation of democracy, nobody would quarrel. But if they hinted at the introduction of dictatorship and its continuation till the people are ready for democracy, they were certainly wrong. If the centuries of authoritarian rule did not teach the people of Pakistan the value of democratic ways of life, does it not follow that democratic institutions will flourish only where democracy is allowed? In partially agreeing with the contention that the people of Pakistan are not politically mature enough to conduct a parliamentary system, Mr. Muhammad Ali, a former Prime Minister of Pakistan, said that this could not be learnt under dictatorship. He said: "The school in which this experience is gained is free elections, and the instrument for imparting this education is open public debate between political parties. Both the school and the instrument may not be perfect, indeed far from it, but the modern world has not yet seen a better means of educating the people." The Times, London, 12 July, 1960.

spring so quickly to the front at the prospect of self-government." They must be prepared to assume their new responsibilities. Not only the quality of their formal education should be high, but also "ways should be sought by which this education could be further adapted as a training for democratic leadership."⁽⁴⁷⁾ It should be gradually "made more widely accessible to the lower ranks of the active politicians."⁽⁴⁸⁾ Those who are already in power must also be conscious of their lack of sufficient training in the art of democratic government and seek more knowledge of democracy through contact and communication with other parts of the world.⁽⁴⁹⁾

To make a success of parliamentary government it is essential to realise that "the masses are as interested in material benefits as in political freedom."⁽⁵⁰⁾ Though it is true that "the parliamentary system, by itself, cannot guarantee a higher standard of living" and that "parliaments do not grow rice, nor cabinets construct irrigation works", the political leaders should not forget that "if these things are not done, the people may lose patience with parliamentary institutions and demand some alternative method of government."⁽⁵¹⁾ On the other hand the citizens must not look to government for satisfying their whole needs. In many spheres of activities they must rely on their own

(47) Problem of Parliamentary Government in Colonies: A Report prepared by the Hansard Society, at p.51 (1953).

(48) Ibid.

(49) Ibid.

(50) Sydney D. Bailey, Parliamentary Government in Southern Asia, at p.90 (1953).

(51) Ibid.

resources, skill and individual efforts. They must understand that "the functions of the State are limited and that much of the essential business of the community should be carried on by unofficial and private organisations."⁽⁵²⁾

Such factors as black marketing, landlordism, corruption, giving "the jobs to the boys", lack of understanding among the leaders, activities of religious minorities, and communist infiltration are often mentioned as the causes of the ills of Pakistan's politics, but they are rather the symptoms, and not the disease itself.

Though our analysis of the conditions necessary for the success of parliamentary government is by no means adequate or exhaustive, it gives an indication of the shape of things that moulded the constitutional developments in Pakistan. One of the constant factors which is causing friction in the smooth working of government is the distance between the two wings of Pakistan. Whether one agrees or not "the division of the country into two parts, separated by a thousand miles of Indian territory, together with the composite nature of the people" seems not only "likely to override the unity of Islam which originally conferred a virtual monopoly upon the Muslim League,"⁽⁵³⁾ it stands as an insuperable obstacle to building up any kind of democratic movements or institutions. Besides, huge administrative problems are also involved which baffle

(52) Ibid.

(53) Sir Ivor Jennings, The Approach to Self-Government, at p.10 (1956).

all solutions. This would also go to explain why it took nine years to produce the country's Constitution and why it was necessary to abrogate it after only another two years. Referring to this need to settle the balance of power between East and West Pakistan and among the various groups of people in the latter Province, Sir Ivor Jennings said:

"For eight years this was the main issue which held up the enactment of a Constitution, to weight the Bengalis against the people of West Pakistan, and to weight the Punjabis against the other people of West Pakistan ... If all this could have been settled in 1946, Pakistan might by now have enjoyed ten years of constitutional government instead of ten years of communal and personal rivalry."⁽⁵⁴⁾

Before we conclude, one or two words are necessary to refer to the Islamic provisions in the Constitution of 1956.⁽⁵⁵⁾ These were inserted in recognition of persistent demand of the Ulema. Serious misgivings were raised in the minds of many as to their future effect on the positive law of the country. The question was whether if it were brought into conformity with Islamic law, the Constitution would remain democratic. Judged by the modern notions of Western Democracy it could not so remain. No attempt, however, has been made to implement these

(54) Sir Ivor Jennings, Problems of the New Commonwealth, at p.29 (1959).

(55) These are contained in the Preamble, Chapter II and sections 196 to 199.

provisions since their enactment, but they could be a source of conflict in the future.

4. The New Regime: The First Phase

Pursuant to the Proclamation of 7 October, 1958, abrogating the Constitution and assuming supreme powers, President Mirza promulgated the Laws (Continuance in Force) Order, 1958. It was deemed to take effect immediately and extended to the whole of Pakistan. (56)

The Republic of Pakistan (the prefix "Islamic" was dropped) was, notwithstanding the abrogation of the Constitution of 23 March 1956, to be governed "as nearly as may be in accordance with the late Constitution." Subject to any order or regulation passed by the President or the Chief Administrator of Martial Law respectively most existing laws were to remain in force; the powers and jurisdiction of the existing courts were continued. Judgments of the Pakistan Supreme Court would be binding on all courts. The power of the Supreme Court and the High Courts to issue the prerogative writs was preserved, but they were not to be issued against the Chief Administrator of Martial Law, his deputy or any person acting under their orders. Notwithstanding that no writ might be issued against an authority so mentioned, the Court could, however, send to such authority "its

(56) President's Order No. I of 1958, P.L.D. 1958 Central Statutes 497.

opinions on a question of law raised" when a writ had been sought against any authority succeeded by each authority. All orders and judgments of the Supreme Court given between the Proclamation and the Order were valid and binding on all courts and authorities, but no writ or order for a writ issued after the Proclamation would have effect unless provided for in the Order. All other applications and proceedings for any writ, not so provided for, abated forthwith. (Section 2)

Section 3 laid down that "no Court or person shall call or permit to be called in question - (i) the Proclamation, (ii) any order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation, (iii) any finding, judgment, or order of a Special Military Court or a Summary Military Court."

Section 4 provided that notwithstanding the abrogation of the late Constitution, all laws, other than the late Constitution, all ordinances, orders-in-council, orders other than orders made by the President under the late Constitution, such orders made by the President under the late Constitution as were set out in the Schedule to this Order, rules, by-laws, regulations, and other legal instruments in force would be continued subject to such necessary adaptations as the President may see fit to make or alteration repeal or amendment by competent authority. No court could call in question any adaptation made by the President under this section.

The Governor of a Province could exercise such powers as he would have had, if directed by the President under Article 193 of the

late Constitution to assume the functions of government of the Province on failure of the constitutional machinery. His power to make ordinances remained the same as conferred by Article 106 and clauses (1) and (3) of Article 102 of the late Constitution. In exercising these powers, the Governor was subject to any directions given him by the President or the Chief Administrator of Martial Law. In case of repugnancy between a Governor's Ordinance or order passed by him under this section and any Regulation made by the Chief Administrator of Martial Law, the latter would prevail.

Section 6 guaranteed the continuance into office of all persons who were in the service of Pakistan as defined under clause (1) of Article 218 of the late Constitution and the Governors, Judges of the Supreme Court and High Courts, Comptroller and Auditor-General, Attorney-General and the Advocate-General would remain in office on the same terms and conditions and would enjoy the same privileges.

Section 7 declared that no provision of law which provided for the reference of a detention order to an Advisory Board would be given effect.

As is obvious, the practical effect of the aforesaid provisions was the abridgment of the powers and jurisdiction of the Courts. Besides they envisaged that henceforward the judicial power of Pakistan would be simultaneously exercised by parallel courts set up by the Chief Administrator of Martial Law. What was particularly important was that the proceedings of the military tribunals could

not be reviewed by the ordinary Courts of law. This was a fundamental and unique departure from the Anglo-American traditions of the supremacy of the judiciary. It may be mentioned that neither during the American Civil War, nor during the prolonged years of struggle between Parliament and the King in England were any external limitations put on the Courts' power to review executive or military proceedings or orders violating the subjects' rights.

Bearing in mind the above the distinctions between martial law as traditionally understood ~~and~~ applied and such rule as introduced in Pakistan, we may proceed to consider the nature of Martial Law Regulations and Orders issued by the Administration.

On 7 October, 1958, General Muhammad Ayub Khan declared:

"1. Whereas I adjudge it essential for national requirements to exercise jurisdiction within the international boundaries of Pakistan, I, the Supreme Commander of the Armed Forces of Pakistan, do hereby give notice as follows:

2. Martial Law Regulations and Orders will be published in such manner as is conveniently possible. Any person contravening the said Regulations or Orders shall be liable under Martial Law to the penalties stated in the Regulations.

3. The said Regulations may prescribe special penalties for offences under the ordinary law.

4. The said Regulations may appoint Special Courts for the trial and punishment of contraventions of the said Regulations and

(57)

Orders and of offences under the ordinary law."

Under Martial Law Regulations issued on the same day the whole of Pakistan, considered as the Martial Law Area, was divided into three zones. The "Zone A" comprised the Karachi Federal Area including Malir, the "Zone B" included the whole of West Pakistan less "Zone A", and the "Zone C" covered the whole of East Pakistan. For each of these zones a military commander was appointed as the Administrator of Martial Law. It was further notified that Orders under these Regulations and additional Regulations, known as Martial Law Orders and Martial Law Regulations, may be issued by the Chief Administrator of Martial Law, or any Administrator of Martial Law, or any other officer authorised (58) by the Chief Administrator.

(1) The Administration of Justice under Martial Law

Two classes of Special Courts of criminal jurisdiction were set up: (i) Special Military Courts, and (ii) Summary Military Courts. These courts were invested with the power to "try and punish any person for contravention of Martial Law Regulations or orders or for the offences under the ordinary law. The criminal courts as by law established would have power "to try and punish any person for offences under the ordinary law and for contraventions of Martial Law Regulations." It may be noticed that the conferment of power on Special Courts to try

(57) P.L.D. 1958 Central Statutes 499.

(58) Ibid.

and punish for offences under the ordinary law and of power on ordinary courts to try and punish for contravention of martial regulations and orders is unparalleled.

(a) The Constitution and powers of

(i) Special Military Courts

An Administrator of Martial Law could convene Special Military Courts in his area for the trial of any offence to which the Martial Law Regulations extended. The ordinary law would include any special law in force in the area. These courts were to be constituted in the same manner and would exercise the same powers and follow the same procedure as a Field General Court Martial convened under the Pakistan Army Act, 1952. The provisions of this Act and the rules made thereunder would apply and govern the proceedings before the Special Military Courts. It was further provided that any person exercising the powers of a Magistrate of the First Class or of a Sessions Judge might be appointed a member of the Court. The Court could pass any sentence authorised by law or by these Regulations. All sentences of death had to be reserved for confirmation by an Administrator of Martial Law.

(ii) Summary Military Courts

An Administrator of Martial Law would, by general or special order, empower any Magistrate of the First Class or any Military or Naval or Air Force Officer, provided that he was specially selected for this particular duty, to hold a Summary Military Court, for the

trial of any offence committed in the area. A Summary Military Court would exercise the same powers and follow the same procedure as a Summary Court Martial held under the Pakistan Army Act, 1952. The provisions of this Act and the rules made thereunder would apply and govern the proceedings before such a Court, except that no other officer was required to attend. The court was not obliged to record more than a memorandum of the evidence nor to frame formal charges. The court could pass any sentence authorised by law or the Martial Law Regulations, except death, transportation or imprisonment exceeding one year or whipping exceeding fifteen stripes. All proceedings before the Summary Court had to be forwarded without delay for review to the Administrator of Martial Law. An Administrator could give general or special directions as to the distribution of cases to the Summary Military Courts.

A later Regulation provided that in a proceeding before the Special Military Courts a regular summary of evidence need not be recorded; in its place an abstract of evidence would be sufficient. Also, it was not essential that the prosecutor should be a person subject to the Pakistan Army Act, 1952. Any Army, Naval or Air Force officer, a Public Prosecutor, a Police Prosecutor, a Police official or a civilian lawyer could be appointed as a prosecutor. (59)

(59) Ibid, Martial Law Regulation No. 37.

(b) Further Provisions

A few more provisions regarding the administration of justice were made under the Martial Law Orders. All proceedings of Special Military Courts, after confirmation by the Administrator, were to be sent to the Judge Advocate-General for final review. Criminal courts were given powers to award punishments under Martial Law Regulations, when they tried offences under the same; they were to follow the procedure of a summons case as provided in the Pakistan Code of Criminal Procedure. A magistrate invested with special powers under Section 30 of the Code of Criminal Procedure could try any offence punishable by death under the Martial Law Regulations.

All sentences of death under these Regulations passed by either criminal courts or special military courts were reserved for confirmation by the Chief Administrator of Martial Law. All offenders sentenced to rigorous imprisonment were treated as ordinary criminals. Whipping was administered by jail authorities.

Sub-Administrators were empowered to convene special military courts and summary military courts. They were also authorised to issue necessary orders and delegate powers of issuing orders to any officer in their own areas. But the power to issue Regulations could be exercised only by the Chief Administrator or an Administrator; the sub-administrators were not given this power.

In case of conflict between Martial Law Orders or Regulations passed by the Chief Administrator and those passed by an Administrator

(60)

or sub-administrator, the former would prevail.

2. The Nature of Offences Under Martial Law Regulations

Martial law in its ordinarily accepted sense deals with only certain specific kinds of offences, such as, creating disturbances or disorders, carrying firearms, entering prohibited areas. It leaves to the ordinary courts, if they are still open and functioning, administration of criminal and civil justice according to the law of the land, because otherwise there would be confusion and denial of justice. And so long as martial law is justified the ordinary courts, as already seen, neither interfere with the military, nor render the military authority any assistance by trying offences under Martial Law Regulations.

The case seems to have been radically different when Pakistan was put under "martial law" in October, 1958. With few exceptions, all offences created by the Martial Law Regulations could and ought to have been dealt under the ordinary law of the land. Many of them were already offences under the ordinary law. The only difference was the liability to a greater punishment under the Martial Law Regulations.

Examples of new kinds of offences are:- "No person shall destroy, deface, remove, or in any way tamper with any notice exhibited under

martial law. Maximum punishment ten years' rigorous imprisonment" and "Every person shall when required to do so give his correct name and address and produce his permit or pass to any military or civil officer or any soldier or policemen. Failure to comply shall be punishable. (61) Maximum punishment death."

An example of an offence under the existing law being made more severely punishable under the Martial Law Regulations is:- "No person shall commit dacoity as defined in the Pakistan Penal Code. Maximum punishment death." Section 395 of the Code lays down that "whoever commits dacoity shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

Such anti-social acts as hoarding foodgrains, wilful adulteration of food, smuggling, child-lifting, abduction of women, using official position to bestow patronage or favours, spreading false and alarming news and many others dealt with by the Martial Law Regulations were offences under the law of the land.

5. The Second Phase

A new turn of events came when on 28 October 1958 General Muhammad Ayub Khan assumed the powers of the President of Pakistan.

(61) P.L.D. 1958 Central Statutes 499-508. The maximum punishment for the latter offence was subsequently reduced.

Twenty-four hours earlier he had been sworn as Prime Minister. In a Proclamation he announced:

"Major-General Iskander Mirza, lately President of Pakistan, has relinquished his office of President, and has handed over all powers to me, General Muhammad Ayub Khan, Chief Martial Law Administrator and Supreme Commander of the Armed Forces of Pakistan.

"Now, therefore, I have this same night of 27 October forthwith assumed the said office of President and have taken upon myself the exercise of the said powers and all other enabling in this behalf." (62)

The reasons why President Mirza stepped aside and handed over all powers to General Muhammad Ayub Khan were stated to be the misapprehension in the minds of many as to the real nature of the dual control which both of them were exercising. Any semblance of such control was likely to "hamper the effective performance of this immense task, which was of an urgent nature." President Mirza said:

"An unfortunate impression exists in the minds of a great many people both at home and abroad that General Ayub and I may not always act in unison. Such an impression, I cannot help feeling, if allowed to continue, would be most damaging to our cause. I have therefore decided to step aside and hand over all powers to General Ayub Khan." (63)

Though, as will be seen, the new President did not withdraw martial law and thought fit to continue it, General Ayub Khan was not

(62) The Times, London, 28 October, 1958.

(63) Ibid.

merely content with the military aspects of his Government. He immediately proceeded with various social, economic and political reforms needed for the progress and well-being of the country and also for the future success of democracy. As early as 25th December, 1958, General Ayub Khan, in commemorating Muhammad Ali Jinnah's birthday, clearly enunciated the policy of his Government:

"Our aim is to introduce a representative form of Government, such as can be understood and worked by our people. We shall have to ensure that such a representative Government is so designed that its working is not marred by political instability. As soon as the major problems facing the country have been solved, the reforms have been put into operation and the administration rehabilitated, the best constitutional brains in our country will be asked to apply themselves to the question of framing a constitution. When doing so, the wishes and desires of the people of Pakistan will be fully respected."⁽⁶⁴⁾

6. The Judicial Views on the Abrogation of the Constitution

(a) The Legality of the New Regime

Immediately after the abrogation of the Constitution, President Mirza declared: "I have no sanction of the law or of the Constitution. I have only the sanction of my conscience" and further "my authority is

(64) Parliamentary Affairs, Vol. XIII, at p.227 (1960).

(65)
the revolution." Without entering a discussion on the relative merits of one's conscience and the need to uphold the legal and constitutional principles even in trying circumstances, we shall proceed to consider the constitutional position of the New Regime as viewed by the Supreme Court of Pakistan.

(66)
In The State v. Dosso, which involved a determination of the validity of the Frontier Crimes Regulation III of 1901, the Supreme Court had to take judicial notice of the fait accompli of 7th October and also interpret some of the provisions of the President's Order No. I of 1958. Incidentally it had to consider the legality of the abrogation of the Constitution. The Court's pronouncement as to the constitutional position created by the President's Proclamation was largely shaped by the views of an Austrian writer, Hans Kelsen. According to him, the decisive criterion of a revolution was the overthrow of the existing order and its replacement by a new one. The new rulers might "annul only the Constitution and certain laws of paramount political significance, putting other norms in their place" and a great part of the old legal order might remain valid also under the new system. But such validity did not depend on the provisions of the old Constitution; if the old laws continued to be valid under the new Constitution, the reason was that validity was expressly or tacitly conferred on them by it:

(65) In an interview with the representative of The Daily Mail, London, 10 October, 1958.

(66) P.L.D. 1958 S.C. 533.

"The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws because the reason for their validity is different. The reason for their validity is the new, not the old, Constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus it is never the Constitution merely but always the entire legal order that is changed by a revolution."⁽⁶⁷⁾

As no other alternative seemed open to the Court, the adoption of the views expressed by Hans Kelsen was clearly inevitable. Of course, it did not escape the notice of the Court that Kelsen was discussing the matter from a different aspect, that of International and not domestic law. Thus, Muhammad Munir C.J. said:

"If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution."⁽⁶⁸⁾

(67) Hans Kelsen, General Theory of Law and State, translated by Anders Wedberg, at p.118, quoted in The State v. Dosso, at pp.539-540.

(68) P.L.D. 1958 S.C. at 539.

According to him, therefore, the success of a revolution or in other words the efficiency of the change would establish its legality. The motive for such a revolution is altogether irrelevant. It "might be prompted by a highly patriotic impulse, or by the most sordid of ends", so long as "the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, than the revolution itself is judged not be reference to the annulled Constitution."⁽⁶⁹⁾ But the failure to effect a change in the Constitution by attempting a coup d'etat would be unpardonable. For then those "who sponsor or organise it are judged by the existing Constitution⁽⁷⁰⁾ as guilty of the crime of treason."

(b) The Meaning of "shall be governed as nearly as may be in accordance with the late Constitution"

In trying to reconcile the abrogation of the Constitution and the directions contained in the President's Order No. I of 1958 that henceforward the Republic of Pakistan "shall be governed as nearly as may be⁽⁷¹⁾ in accordance with the late Constitution", Muhammad Munir C.J. expressed the view that as the laws kept alive by subsequent Article IV of the same Order did not include the late Constitution it must be assumed that its provisions could no longer be enforced. "The laws that are

(69) Ibid.

(70) Ibid.

(71) Article II, clause 1, P.L.D. 1958 Cen. St. 497.

in force after that date (7 October, 1958) are enumerated in Article IV, but from the list of such laws the Constitution of 23rd March, 1956, has been expressly excluded. This means that when, under clause 4 of Article II of the Order, the Supreme Court or the High Court is moved for a writ, the ground for the writ can only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that Order and not the violation of a right created by the late Constitution." (72)

As the question before the Court was whether the impugned Frontier Crimes Regulation violated the provisions in the late Constitution guaranteeing Fundamental Rights, Muhammad Munir C.J., in stating the aforesaid opinions, concluded that fundamental rights could no longer exist. He said:

"The so-called Fundamental Rights which were described in Part II of the late Constitution are therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court has under the new Order the authority to issue any writ on the ground of the violation of any of the fundamental rights." (73)

In his opinion, though the very essence of a fundamental right is that it is more or less permanent and can not be changed like the ordinary law, under the new legal order any law might at any time be changed by the President and therefore "there is no such thing as a fundamental right, there being no restriction on the President's

(72) P.L.D. 1958 S.C. at p.541.

(73) Ibid, at p.541.

(74)
law-making power." So far as the Courts were concerned they could not, unless the President expressly enacted the provisions relating to fundamental rights, issue any writ on the ground that such rights as guaranteed by the late Constitution had been violated. They were no longer "a part of the law of the land."

In explaining the apparent conflict between Articles II and IV, Muhammad Munir C.J. said that the provisions "shall be governed as nearly as may be in accordance with the late Constitution" contained in the former Article referred only to the machinery of the government and not to the laws of the late Constitution. "It is true that Article II provides that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision does not have the effect of restoring fundamental rights because the reference to Government in this Article is to the structure and outline of Government and not to the laws of the late Constitution which have been expressly abrogated by Article IV. Article II and Article IV can therefore stand together and there is no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which are more specific and later must
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override those of Article II."

(76)
In an appeal against a judgment of the Dacca High Court, Muhammad Munir C.J. repeated the views he had expressed in Dosso's case and said that the contention that the Court was under a duty to ascertain from

(74) Ibid, at p.541.

(75) Ibid, at p.541.

(76) The Province of East Pakistan v. Mehdi Ali Khan, P.L.D.1959 S.C.387.

the general direction that, with the exception of the parts expressly abrogated, Pakistan should be governed by the 1956 Constitution, "qualified by the discretion implied in the expression 'as nearly as may be' in Article 2(1) the precise part of the law of the Constitution", would merely create confusion in the administration of the laws. In his opinion such interpretation would be inconsistent with the clearly defined scheme of the short document (which was described by one of the counsel before him as "the shortest constitution in the world"). As the Constitution was abrogated and the entire legislative and executive authority vested in the President and the powers of the courts themselves were subject ~~to~~ to orders of the President, the existence of a fundamental right guaranteed by the late Constitution would seem to be a self-evident contradiction and their further con-
(77)
tinuance a complete impossibility.

Cornelius J. differed from the views expressed by the majority of the judges of the Supreme Court. In reappraising the provision of the Laws (Continuance in Force) Order, otherwise known as President's Order No. 1 of 1958, after the lapse of nine months, he felt that though the late Constitution was abrogated, still the words "shall be governed as nearly as may be" were "of high importance as furnishing a key to the understanding of the true nature of the Martial Rule
(78)
imposed upon the country by the then President on 7th October, 1958."

(77) Ibid, at p.405.

(78) Ibid, at p.438.

He did not agree that this expression referred only to the structure and outline of Government and not to the laws, including the law of the Constitution and that it did not have the effect of preserving the fundamental rights. During the period of nine months after the Proclamation of 7th October, 1958, it was seen that the Constitution was "being observed, not as a mere matter of courtesy or of merely general guidance, but that in actual practice, where the provisions of the late Constitution are applicable in their terms to matters for governmental action, they are being applied according to their (79) terms." Also, as a matter of practice where the circumstances required variation or modification, the present authority was readily making the necessary changes. From "this degree of adherence to the provisions of the late Constitution" Cornelius J. was induced to observe that the words "shall be governed as nearly as may be in accordance with the late Constitution" had been to some extent undervalued on the last occasion when the Supreme Court were deciding the case of the State v. Dosso. He candidly admitted that "the full power and purpose of these words may not have been appreciated at that (80) early date."

It would be wrong to suppose that the provisions of Article 2(1) of the Laws (Continuance in Force) Order, 1958, were comparable to a mere reference book, or as was suggested by counsel, an Instrument of

(79) Ibid, at p.438.

(80) Ibid, at p.439.

Instructions of the kind which were issued to the Governor-General of India and Governors of Provinces by the British Sovereign under the Government of India Act, 1935. According to Cornelius J., "the words 'shall be governed' are mandatory in expression as well as in effect, and by saying that the provisions in question shall be operative subject to specified written instruments issued by the highest authorities of the new regime, the value and force of the words in which these provisions are embodied in the late Constitution is certainly raised, (81) in a legal sense much beyond that of words in a mere book of reference."

Further, the apparent conflict between the above expression securing the continuity of the provisions of the late Constitution and Article 4(1) of the Laws (Continuance in Force) Order, 1958, which expressly provides that nothing in the late Constitution shall operate as positive law from 7th October, 1958, seemed to raise great difficulty and could only be resolved by reference to legal theory and political philosophy. It appeared that "the directory provisions of the late Constitution referred to in Article 2(1) have, subject as expressed in (82) the Order, been subsumed into the Martial Law." The constitutional provisions no longer derive any force from their existence in the Constitution "but exists only because of and by reason of the Martial Law, and only to the extent that the Martial Law by expression does not (83) recall or avoid them."

(81) Ibid, at p.440.

(82) Ibid, at p.440.

(83) Ibid, at p.440.

(c) A Different Concept of Martial Law

In none of the cases as yet decided has the fundamental question of the meaning of martial law and the conditions in which it may be applied been agitated or determined. The claim to introduce a new Constitution and rule under it is one thing; to continue to govern by martial law for an indefinite period is, however, entirely different. Be that as it may, it seems that Cornelius J. proceeded to consider the difference between martial law as applied in Pakistan since 7 October, (84) 1958, and its ordinary conception. Martial law generally means when applied to occupied territory by the commander of a conquering Army, or to a part of one's own country by the civil government, "the entrustment of plenary powers to the armed forces for the purposes of restoring law and order." (85) Within the municipal sphere it could be applied only when "conditions have reached a point of disturbance beyond the capacity of the civil authorities to control." (86) It did not escape his attention that "it is not at all common to find Martial Rule being introduced over a whole country in circumstances of general peace." (87)

Martial law as was being enforced in Pakistan bore a close resemblance to the application of martial law in an occupied territory and was very different from "the like application over a disturbed area of municipal territory." But as the suspension of sovereignty or the replacement

(84) Ibid, at p.439.

(85) Ibid, at p.439.

(86) Ibid, at p.439.

(87) Ibid, at p.439.

of governmental agencies in an occupied territory did not imply that such rule was purely arbitrary as to the exercise of power or uncontrolled by principle or unrestricted as to method, so also in Pakistan, though the new regime must be established and maintained by demolishing the foundation upon which the previous and superseded sovereignty was based, "it is not essential that the provisions of that Constitution so far as they operate upon the lives of ordinary citizens, through the machinery of government at all levels, should be affected beyond the absolute necessity."⁽⁸⁸⁾

(d) Did Fundamental Rights Exist after the Declaration of Martial Law?⁽⁸⁹⁾

In The State v. Dosso Muhammad Munir C.J. categorically denied that the fundamental rights as guaranteed by the late Constitution still existed or that the Court had power to issue a writ on the ground that any of those rights were infringed. Like the other constitutional provisions they were swept away by the provisions of Article IV of the Laws (Continuance in Force) Order, 1958. After explaining the discrepancy between this Article and Article II of the same Order, he expressed the opinion that the fundamental rights did no longer exist and the latter Article did not "have the effect of restoring fundamental rights."⁽⁹⁰⁾

Cornelius J., though he conceded that the Laws (Continuance in Force) Order, 1958, "must prevail over anything appearing in the

(88) Ibid, at p.440.

(89) P.L.D. 1958 S.C. 533.

(90) Ibid, at p.540.

Constitution of 1956 or anything seeming to have validity only by reference to the provisions of that Constitution", was not certain whether the mere abrogation of the Constitution could take away the fundamental human rights. With reference to a number of fundamental rights as enumerated in Part II of the late Constitution it could be asserted that "they do not derive their entire validity from the fact (91) of having been formulated in words and enacted in that Constitution."

He said that "a number of these rights are essential human rights which inherently belong to every citizen of a country governed in a (92) civilised mode." It did not appear that merely because the Constitution which embodied them had ceased to exist, these elementary human rights should also come to an end.

(93)
In a later case Cornelius J reaffirmed his views about the enforceability of the fundamental rights, though as a consequence of the promulgation of the Laws (Continuance in Force) Order, 1958, "the compulsive force of the fundamental rights in respect of all laws and (94) all executive actions was at one stroke taken away." It was true that in the absence of a saving provision or feature "every proceeding before a court in which the question of the issue of a writ to enforce a Fundamental Right was pending" would fail. But he asked whether it

(91) Ibid, at p.560.

(92) Ibid, at p.561.

(93) The Province of East Pakistan v. Mehdi Ali Khan, P.L.D. 1959 S.C. 387.

(94) Ibid, at p.437.

was necessary for the authorities of the new regime to insist that every such proceeding should be abruptly terminated. He said:

"I can imagine that this harsh procedure might have been deemed unavoidable where the pendency of a writ was in itself, in a large way or in a small way, a threat to the paramount authority of the new regime. But looking through the list of Fundamental Rights, I cannot find any one of them (other than that relating to preventive detention, which received special treatment in the Order) which might in itself, by being put into operation, have prejudiced the success of the new regime as it has been observed in operation during the past nine months. It is true that the suspension of constitutional guarantees frequently accompanies the promulgation of Martial Law, and it is true that even the late Constitution by Article 191 empowered the President in a state of emergency to issue a proclamation and during the pendency of such proclamation, by Article 192 the President was empowered to 'suspend (95) proceedings for the enforcement of the rights ... '"

But in view of the provisions contained in Article II of the Laws (Continuance in Force) Order, 1958, it could be said that, though the Constitution was repudiated, "its provision, so far as applicable in the changed conditions resulting from the dissolution of the Legislatures and the dismissal of the elected Governments, would continue to be applied in practice, though subject to the expressed will of the (96) new Sovereign authorities."

(95) Ibid, at p. 437

(96) Ibid, at p. 438

Cornelius J., however, admitted that despite the legality of the form which the fundamental rights still possessed and the fact that they once possessed the highest legal force and effect, they were under the changed conditions not supported by any legal sanctions. As a result, "no actions at law can be based upon these provisions, and the courts possess no authority for their enforcement, because they are subject only to the same sanctions as are applicable to the Martial Law."⁽⁹⁷⁾ In his opinion, if this view was correct, it followed that the fundamental rights had not become entirely devoid of validity, any more than the preamble of the late Constitution or the Directive Principles of State Policy. He said:

"The Fundamental Rights have indeed lost the operation which was conferred upon them by the provisions in Article 4 of the late Constitution, but they nevertheless remain as provisions in the late Constitution, and are valid to the extent assured by Article II(1) of the Order."

7. The Trial of Offences under the Martial Law Regulations and the Court's Jurisdiction to interfere

(98)

Elaborate provisions were made by a subsequent Regulation as to the procedure governing the review and confirmation of sentences by

(97) Ibid, at p. 441

(98) Martial Law Regulation No. 61, P.L.D. 1959, Cen. St. 1-2.

higher authority. It provided that, subject to any order made by the Zonal Martial Law Administrator in consultation with the Provincial Governor (or in case of Karachi, the Federal capital, the Chief Commissioner) directing that a particular case or class of cases under the Martial Law Regulations or Orders should be tried by or transferred for trial to a Special Military Court, Magistrates exercising First Class powers should try such cases. But offences punishable with death were to be tried by a magistrate invested with special powers under Section 30 of the Code of Criminal Procedure, a Sub-Divisional Magistrate exercising First Class powers, an Additional District Magistrate or a District Magistrate.

No appeal would lie against any sentence passed in accordance with the above provisions, and by a subsequent amendment (99) it was further provided that no revision would lie from such sentence. Neither any appeal or revision would lie from any sentence imposed in any cases tried by a criminal court and confirmed by the Martial Law Administrator before the 24th December, 1958.

The procedure for revision of sentences passed by a Magistrate varied with nature and extent of the punishment. Section 3 provided that an application would lie within fifteen days to the Court of Session in respect of sentences other than transportation or death, and in respect of sentences of imprisonment for a term not exceeding four

(99) Martial Law Regulation No. 63, Ibid, at p.90.

years, whether or not such sentences were combined with any other punishment, and to the High Court in respect of all other sentences. While hearing an application under the above provisions a Court of Session and the High Court should exercise powers conferred by subsection 1 and follow the procedure in sub-sections 2, 4 and 6 of ~~xxx~~ section 439 of the Code of Criminal Procedure but ~~not~~ the powers in section 426 of the Code were not to be exercised. Clause 1 of section 439 empowers the High Court acting in revision to exercise the powers of a court of appeal (including the power in section 426 to ~~xxxx~~ release the petitioners on bail). Clause 2 gives the petitioners the right to be heard; clause 4 forbids an order of acquittal to be converted into one of conviction. Clause 6 provides that the petitioners may be called on to show cause against enhancement of sentence. Before the abrogation of constitution, a court of session could only make recommendations; the power to interfere could only be exercised by the High Court. No further revision would lie from an order so passed by a Court of Session or the High Court and no court should call such order in question.

In case of sentence of death passed by a Magistrate the proceedings were to be submitted to the High Court within seven days for confirmation of the sentence and the said Court should proceed as upon a reference under chapter twenty-seven of the Code of Criminal Procedure, which lays down the procedure for confirmation of death sentences passed by a Court of Session, and its decision could not be

called in question in any Court.

Every sentence imposed by a (Special) Military Court according to the provisions of section 1 of the Regulation was subject to review and confirmation as provided by the Pakistan Army Act, 1952, in the case (100) of sentences passed by a General Court Martial. By a later amendment sentences imposed by magistrates were not required to be sent to the Zonal Martial Law Administrator for confirmation or to the Judge Advocate-General for review.

In respect of all sentences imposed under the above provisions, a petition would lie to the Zonal Martial Law Administrator and, in case of a sentence for the period of not less than seven years' rigorous imprisonment being confirmed by him, a further petition could be made to the Commander-in-Chief of the Army as the Deputy Chief Martial Law Administrator. Short periods of limitation were also (101) provided for making these applications.

A Zonal Martial Law Administrator could delegate the power of confirming the proceedings of any (Special) Military Court to a (102) subordinate commander.

(100) Martial Law Regulation No. 63, P.L.D. 1959 Cen. St. 91.

(101) Ibid. By Martial Law Regulation 66-A, paragraph 9, added to Regulation 61, provided nothing in the latter Regulation "shall prevent a review of sentence - (a) by the Deputy Chief Martial Law Administrator where the sentence is not less than seven years' rigorous imprisonment; (b) by the Martial Law Administrator concerned in all other cases - where the Chief Martial Law Administrator sees fit, by general or special order, to direct such review."

(102) Martial Law Regulation No. 63.

The constitution and jurisdiction of a Military Court, whether Special or Summary, and the proceedings, orders or sentences passed by such a Court, could not be called in question in any Court, including the High Court and the Supreme Court. (103)

On the transfer of a case pending before a Magistrate to a Special Military Court the latter was not bound to recall and rehear any witness who gave evidence before such transfer, but could act on the evidence already recorded by the Magistrate.

All the foregoing provisions for the trial of offences under the Martial Law Regulations and Orders, simple and well meaning though they might be, struck at the very foundations of criminal and civil justice. How could the magistrates and judges, who are, by their training and habits, accustomed to a different method of arriving at the truth of an allegation, be expected to administer the Regulations which were fundamentally incapable of even palm-tree justice? A slight improvement is noticeable in the amendment of the above provisions, which provided that "with effect on and from the 1st day of March, 1959, no case relating to an offence under any of the Martial Law Regulations shall be tried by any court other than a Military Court, Special or Summary: Provided that cases which are pending in courts other than Military Courts shall continue to be dealt with in accordance with the provisions of Martial Law Regulation 61, as it stood immediately before this

(104)
Regulation."

(105)
Earlier in a case decided by the West Pakistan High Court it was observed that an anomaly would arise "if an offence under the Martial Law Regulations and one under the Pakistan Penal Code which, as in the present case, happens to be a warrant case, are tried together. In the opinion of the Court it was desirable "in cases where the provisions of the Pakistan Penal Code or any special law and the Martial Law Regulations are alleged to have been contravened that there should be separate trials so that the difficulty pointed out above is not experienced."
(106)

Though the nature of martial law as applied in Pakistan today is entirely different from that as ordinarily understood, it is essential to remember that, if confusion is to be avoided, martial law regulations and orders should be administered by separate courts. The ordinary courts should have nothing to ~~do with~~ do with them.

(104) Martial Law Regulation No. 66.

(105) Fateh Muhammad v. The State, P.L.D. 1959 Lahore 171.

(106) Ibid, at p.175.

Chapter XII

CONCLUSION

Beginning from the definition of martial law which, according to Blackstone, is "in truth and reality no law, but something indulged rather than allowed as law"(1), we have, in the preceding pages, discovered certain positive characteristics inherent in this "lawless" system. The expression, though it has undergone gradual transformation in meaning and content, is not only descriptive of a state of affairs, but has also its individual norm. Looked at institutionally, the concept of martial law has always been identified with the Executive, especially the Armed Forces. But neither executive nor military authorities, when exercising the widest possible discretion in times of extreme necessity have acted on the assumption that no law bound them, even if demands have occasionally been made that in times of grave crisis, law must be ignored. Such claims have not been judicially approved, though courts in America and the Commonwealth have conceded that, during a state of war, military acts cannot be interfered with. Common sense as well as reason also demand that the assumption of special powers by the Armed Forces should be legally justified by the existence of reasonable and probable cause. The emphatic assertions that the court has jurisdiction to decide whether a state of war exists and will, as soon as it ceases to exist, entertain

(1) Commentaries, I, 414.

proceedings against any military acts alleged to have been unnecessary or done in bad faith or with malice clearly establish that the armed forces are not above the law, but subject to judicial supervision and control. "The reason of the law, as the judges often said, was compressed in the maxim Quod enim necessitas cogit defendit. And both the existence of the danger and the propriety of what was done to meet it were questions for the courts".(2) An Act of Indemnity will not cover acts which were unnecessary or improper. If there has been abuse of power in declaring martial law, the court will restrain the acts of the authority.(3)

The concept of martial law, so far as now consistent with the constitutional principles, is the result of an evolutionary process. We have already considered how the Tudor kings at times applied or threatened to apply the summary justice of martial law against civilians during the time of peace and while the ordinary courts were open. The Stuarts "whose method was to claim all debateable ground for the prerogative and then to consolidate their position" used to issue commissions empowering various persons, civil as well as military to proceed by martial law and to punish soldiers and "other dissolute persons" joining with them for robberies, felonies, mutinies and other outrages.(4) The contention of the parliamentary leaders, accepted by the sovereign and embodied in the Petition of Right, 1628, was that not even soldiers, much less civilians, might be tried by martial law within the realm, except

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- (2) Charles Fairman, The Law of Martial Rule and the National Emergency, (1942) 55 Harvard Law Report at page 1257.
 - (3) Chapters IV, VI and VII.
 - (4) Chapter I.

when war prevailed and the common law courts did not function.

Whether it is due to the declaration contained in the Petition of Right, 1628, or the increased awareness of the relations between law and governmental power, or the relative absence of any formidable disturbance, martial law has never been formally declared in England since that date. But, as has been asserted, martial law "is assuredly part of the law of England" if it means "the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary", but not when it is used "as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts".(5) The experience of England shows that government by law makes obedience to law instinctive and loyalty the prevailing sentiment, thus rendering resort to force either by the citizens or the authority an anachronism. Practice in the colonies points to a different conclusion, but, even apart from occasional exercise of powers under a proclamation of martial law, the dependent position of colonial territories itself made administration more important than law.

This requires some elaboration. In the United Kingdom governmental powers, both executive and legislative, are exercised by a sovereign Parliament, composed of the King, Lords, and Commons. Though the king is the head of the executive government, it is the Prime Minister and his cabinet which has virtually monopolised the exercise of the executive power. The cabinet and the Prime Minister is dependent on the House of Commons

(5) A. V. Dicey, The Law of the Constitution, Tenth edition, at pp. 290-1. (1959)

and subject to its criticism and control. Theoretically speaking, Parliament can make or unmake a law, and its decisions will be equally binding whether they meet public approval or not. In practice, however, it rarely transgresses the constitutional limits. To ensure the success of its policies and measures, the ruling party invariably seeks to ascertain the various shades of opinions as reflected in the Houses of Parliament. It tries to gauge popular feelings by following the discussion in the press and the platform. As a result, the proposed measures in their final form often embody a compromise between conflicting interests, opinions and sentiments. This talent for compromise, according to a well-known jurist, explains the continued success of a system so difficult to work. "Without a talent for compromise, no government or society, political or other, can enjoy happiness or even internal quiet. Whenever sovereign power is lodged in a body of persons, (whether it be one and homogeneous, or consist of heterogeneous bodies), differences will naturally arise between its constituent members, which, without a perpetual compromise, must prevent their acting in concert. Even an autocrat, if he would reign securely, must perpetually defer to the opinion of the subject community, or to that of the section of the community with which he controls the rest".(6)

If, instead of proper weighing and balancing the differences of opinions on a proposed course of action, the cabinet tries to implement a decision, the chances are that it may have to retrace its steps.

(6) John Austin, A Plea for the Constitution, at p.6 (1859)

Recently, the Suez crisis in 1956 has amply demonstrated this fact. Though Parliament in the United Kingdom constantly endeavours to provide the English people with good government, efficiency alone, which may only be secured by more control than the legislature or the people will accept, has been abandoned as an aim. It has been recognised that government must have as its foundation the free consent of the people governed, not only generally but also on each individual item of legislation that affects its interest.(7)

As is obvious, a similar course of action, though desirable, could not be practised in governing colonial peoples. The very relationship of the rulers and the governed sometimes unnecessarily generated violent feelings and created commotion beyond the power of the civil authority to control. Apart from a few instances of unduly harsh measures, (both public and legal opinion condemned them in unambiguous terms) mostly confined to the West Indies, the enforcement of martial law in the colonies did not on the whole impose any excessive hardships. At the same time it must not be forgotten that, on every occasion when martial law has been declared in the colony, the Governor had to justify his action either before the courts or the Imperial Government at Westminster. It is also remarkable that the legislators, the judges and the law officers of the Crown have been uniform in upholding the views that martial law can only be declared in cases of extreme necessity. The declaration of martial law

(7) "Statutes in this country do not have to be promulgated since they are assumed to be already known". Marshall and Moodie, Some Problems of the Constitution, at p. 15 (1959)

in the Commonwealth has never been from political motives or to solve political disputes. One will, therefore, agree that so far as the Commonwealth is concerned "on the whole, however, the course of development has been toward law and away from unrestrained power as the dominant influence in government".(8)

Incidentally, it may be mentioned that though the rule of law, as understood by Dicey,(9) was never fully effective in the colonies, two processes involved in the method of colonisation prevented the establishment of government by decrees or purely arbitrary rule. First, as soon as government was established in the colony, laws defining the powers of the Executive as well as other laws were enacted by the United Kingdom Parliament. Gradually legislatures in the colonies were entrusted with powers to legislate on specified subjects. Secondly, ordinary courts were empowered to administer the "Laws of the land". Excluding those occasions when martial law was declared (they were few and far between and necessarily brief in duration) no military tribunals were set up to

(8) Bernard Schwartz, Law and the Executive in Britain, at p.2 (1949)

(9) "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals". A. V. Dicey, The Law of the Constitution, Tenth edition, at pp. 188-193 (1959)

administer criminal justice. It is important to bear in mind that even when such tribunals were created they were not empowered to deal with ordinary offences.

The instances of the applications of martial law by the State authorities in America unmistakably show that sometimes it was sought to be used to adjust social and political relations; the attempts of the State governors to exercise their discretionary prerogatives on grounds other than recognised by law were foiled by the courts. "Occasionally the governor declares 'martial law' as a trump card in some contest with political rivals. In 1935 Governor Johnson of South Carolina tried to get rid of the highway commissioners by declaring them to be insurgents - only to be restrained by the State Supreme Court.(10) Governor Quinn of Rhode Island, seeking to tap the strength of an opponent who was also proprietor of the Narragansett Race Track, established martial law over the track. When Senator Huey Long was at war with Mayor Walmsley for control of the New Orleans police board, Governor Allen, acting from the Senator's hotel suite, obligingly called in the troops and instituted an extraordinary regime which he described by the alliterative title of "partial martial law". In 1939 Governor Rivers of Georgia proclaimed "martial law" around the highway department's building as a device for excluding the chairman, whom he had already been enjoined from removing, and later expanded his proclamation to protect his military agents from punishment for their contempt - all of which was brought to naught by the

(10) Hearon v. Calus, 178 S.C.381 (1936)

State Supreme Court and the Federal District Courts".(11)

The present example of "martial law" in Pakistan is, in many respects, novel. To-day it exists there as a system of government. The country is governed by Presidential decrees; no constitution has yet been framed and no legislature has been established; the courts are powerless to assert their independence; all political parties are banned and the citizens have no right to challenge the infringement of their rights and criticise governmental policies and measures. In brief, military government has been established to promote efficiency. Its claim seems to be the sacrifice of individual rights for the sake of the interests of society.

The most conspicuous feature of the regime is the trial of citizens by military commissions. In the absence of any real or threatened disturbance endangering the security of the State, the claim to try citizens by military tribunals would seem untenable. It is obvious that military tribunals which are "merely committees formed for the purpose of carrying into execution the discretionary power assumed by the government", (12) lack all the attributes of an ordinary court. The need to recognise

(11) Patten v. Miller, 190 Ga. 105; Miller v. Rivers, 31 F. Supp. 540; referring to these and many other instances of such applications of martial law Charles Fairman said:- "Episodes of this sort have given rise to many misleading cases. For a time it seemed that in several jurisdictions there was a short and safe way of getting over any difficulty without fuss about legality". He rightly concluded that Hughes, C.J.'s opinion in Sterling v. Constantine, (1932) 287 U.S. 378 "brought order in this wild area". (1942) 55 Harvard Law Report 1253.

(12) per Mr. Justice Stephen, History of the Criminal Law, Volume 1 at p. 216 (1883); In re Clifford and O'Sullivan, (1921) 2 A.C. 570; Tilonko v. The Attorney-General, (1907) A.C.93.

that, in time of peace the exercise of judicial power must not be entrusted to them, is insistent and apparent.

As the basis of the proclamation of martial law in Pakistan in October 1958 was entirely different from that on which such a proclamation usually rests, it would be futile to expect similar judicial pronouncements from the courts in Pakistan. Apart from the questions whether the success of the new regime requires that the citizens of Pakistan should be governed by "Martial law", when no state of war apparently exists and whether such rule can ever solve the problem of distribution of powers among different organs of government and the territorial units of the State, the most important criticism of the present regime has centred round the necessity of upholding the rule of law. Obviously the rule of law cannot exist when martial law is enforced or executive absolutism prevails. We need not discuss the values of personal liberty, freedom of belief and expression and the supremacy of the law, but may refer to the existence of opinion in Pakistan which has openly advocated them as a check against the exercise of unrestrained governmental power. Thus, Chief Justice Kayani of the West Pakistan High Court, in lamenting the sacrifice of fundamental civil liberties to the gods of order and progress, made this celebrated remark:

"There are quite a few thousand men who would rather have the freedom of speech than a new pair of clothes, and it is these that form a nation".(13)

(13) The Times, London, 12th July, 1960.

It is true that the Executive may genuinely attempt to act "according to law", but unless the judiciary, which can set the proper limits to the exercise of power, is independent, the claim that the rule of law exists in Pakistan under the present martial law regime would merely seem paradoxical.

A permanent system of martial law is equivalent to dictatorial rule. Those who uphold the principles of justice cannot give countenance to martial law in time of peace,(14) much less to martial law as a system of government as it will sooner or later degenerate into petty tyranny.

It may also be mentioned that at present there is no separation of governmental powers in Pakistan. All governmental power has been concentrated in the hands of the Executive. Montesquieu's theory pushed to its logical extreme may produce undesirable results, but "still there is the basic lesson against the overconcentration of power in any one branch of government".(15) Some division of power is essential in a State governed by law. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.....where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted".(16)

(14) "Of course no common law lawyer could feel much respect for so rude a system of justice". (1942) 55 Harvard Law Report at 1258.

(15) B. Schwartz, Law and the Executive in Britain, at p. 15.

(16) The Federalist, No.47 (Madison)

These references to the values of democracy and the machinery to ensure it would have been unnecessary if martial law had not been continued for such a long period and the tendency to centralise the administration had not been exhibited. Both were sufficient to raise misgivings and doubts. The claim of the present regime, that the measures adopted by it, though radical in many respects, aim at removing the persistent obstacles unfavourable to the working of a democratic government, may raise certain hopes and it was, therefore, extremely reassuring to hear President Ayub Khan when, addressing the Bar Association of the Karachi Branch of the West Pakistan High Court, he said:

"The several reform commissions and committees which had been set up were working with speed to prepare the country for a representative form of government. As soon as these basic things looked like getting under way, a constitutional commission consisting of the best brains in the country would be established and its recommendations put before the country. Free and unfettered elections would be held thereafter".(17)

The extraordinary measures under the regime have been continued on the alleged ground that the people were not yet ready to work a parliamentary democracy and needed time to prepare themselves for it. (critics have pointed out that democratic processes cannot be learnt under authoritarian rule) It is with this end in view that President Ayub Khan has promulgated the Basic Democracies Order, 1959, under which basic village councils have been set up and these will, by indirect election,

(17) The Times, London, 16th January, 1959.

choose the future representatives to the National and Provincial Legislatures. It is also noteworthy that the present regime, though mainly deriving its support from the Army, is using civilian organs in carrying the country's administration. Whatever its other failures and shortcomings may be, it must be undoubtedly recognised that President Ayub Khan's revolution "has consisted in carrying forward with military despatch what the politicians promised but failed to perform".(18) The vigorous land reforms in West Pakistan, cleaning the civil service of corrupt officials, rehabilitation of the refugees, enforcement of laws against tax evasion will always remain as the best examples of "an honest zeal for the public welfare".

Whether the martial law regime will produce results justifying its imposition is yet to be seen. To provide the country with a genuinely democratic constitution is its biggest task. President Ayub Khan has expressed his preference "squarely and unshakably in favour of a presidential system in which a strong executive would be saved from the need to haggle for support from members of the Legislature".(19) At present the Constitution Commission is considering various proposals on the future constitution. Public opinion has so far been positively in favour of a parliamentary system of government with a new set of checks and balances and the withdrawal of martial law.(20) In fulfilling, without abdicating, the responsibility for protecting the best interests of the country, all personal inclinations should be subordinated to the

(18) The Daily Telegraph, London, 27th October, 1959.

(19) The Times, London, 12th July, 1960.

(20) The Guardian, London, 29th August, 1960.

necessity of respecting the people's opinion.

The task of replacing the present military government with a constitutional government is stupendous and the method of approach to the problem is unique. Until it is accomplished most people would agree that patient expectation is preferable to barren cynicism. "Judgment must wait", yet a few remarks without prejudice may be ventured.

What is happening in Pakistan to-day is, in all probability, a temporary phase. The problems raised by such prolonged continuation of martial law will undoubtedly attract attention, and unless they find immediate solutions, fresh complications are bound to arise. The approach to these solutions involves two considerations. First, it is a necessity to understand the essential nature of martial law, the circumstances in which its application will be consistent with constitutional principles, and the limits to executive or military discretion when it is being enforced. If the principles governing its proclamation and enforcement are lacking, practices indulged in by the present regime in Pakistan must be discontinued. Such mild judicial astonishment as has been expressed by a dissenting judge of the Supreme Court (21) would be hardly sufficient to deter the executive authority from pursuing a course of action which will find no support in the Anglo-American jurisprudence. It is essential that the highest court in the

(21) "It is not at all common to find Martial Law being introduced over a whole country in circumstances of general peace. Such a condition approximates more closely to the application of Martial Law to an occupied territory than to the like application over a disturbed area of municipal territory", per Cornelius J., as he then was, in The Province of East Pakistan v. Mehdi Ali Khan, P.L.D. 1959 S.C. 387 at p.439.

land should give clear indications as to the proper sense in which martial law is applicable in Pakistan in future, the limits to which the executive should confine itself, even in times of extreme necessity or national emergency and the extent of the citizen's rights. If it fails the supremacy of the law will never be a reality.

Secondly, in devising a future Constitution for Pakistan, the present regime should be guided by the principles governing the general legal and political pattern of the other members of the Commonwealth. Such assertions as were made by the Indian Prime Minister immediately after President Ayub Khan's assumption of powers (22) merely indicate the preponderant feelings in the other countries of the Commonwealth. Any sharp deviation from the common pattern is liable to arouse suspicion and doubts in the minds of the other Commonwealth citizens. The harmonious development of relationship between the members of the Commonwealth, the growth of common democratic institutions and the consideration of deriving maximum benefits from the membership of the Commonwealth point to the only conclusion, namely, Pakistan should retain a democratic constitution.

It is essential to recognise that if a nation is constitutionally impoverished, no doctrine or philosophy would be adequate to advance it in the field of cultural, economic and scientific progress. If the oft-repeated charge that the previous parliamentary government was weak to maintain its own existence, is it not legitimate to inquire "must a government of necessity be too strong for the liberties of the people"? (23)

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- (22) "The very basis of the Commonwealth has been democratic institutions and the parliamentary form of government" Pandit Jawaharlal Nehru's statement in Parliament, The Times, London, 21st November, 1958.
- (23) President Abraham Lincoln, quoted in Martial Law in Hawaii, (1942) 30 California Law Review at p.388.

It must be recognised that, at least since Cromwell's time, the way in which the present regime in Pakistan has been set up and the way in which it has functioned up to the present is unique. That circumstances in Pakistan made them necessary may be true and it may be conceded that those who now wield power in Pakistan are not pursuing their own ends but are bona fide patriots whose aim is to create a situation in which democracy may become a reality but it has created a precedent in the Commonwealth to which, in countries where independence has only recently been achieved or in which it will shortly be achieved, politicians of a different type may appeal when setting up a "martial law" regime to achieve personal or party objectives. Whatever form the Pakistan Constitution may ultimately take, it would seem essential that it should contain a chapter which should clearly set out in what circumstances and by whom martial law may be declared and the jurisdiction of the courts over the acts of those who exercise powers to declare and administer martial law. Such success as the present regime in Pakistan has enjoyed has been due to the fact that the politicians were taken by surprise. If any individual or body of persons were to contemplate setting up a similar regime after the new constitution has been promulgated, he or they would not find those against whom such action were aimed unprepared and the results of such an attempt might be disastrous. The supremacy of the Constitution must be guaranteed and extra constitutional actions prohibited. If Pakistan is to avoid another experience similar to the present, the power to deal with emergencies must be declared in the Constitution.

APPENDIX I

14 April, 1919.

AN ORDINANCE TO PROVIDE FOR THE TRIAL OF PERSONS CHARGED WITH
OFFENCES UNDER THE BENGAL STATE OFFENCES REGULATION 1804

Whereas the Governor-General is satisfied that a state of open rebellion against the authority of the Government exists in certain parts of the Province of Punjab;

And whereas the Governor-General in Council has, in exercise of the powers conferred by Section 2 of the B.S.O. Regulation, 1804, suspended, in respect of offences described in the said Regulation with which any person of the classes therein referred to may be charged, the functions of the ordinary courts of Judicature within the districts of Lahore and Amritsar in the aforesaid Province and has established martial law in the said district; and has directed the immediate trial by courts martial of all such persons charged with such offences;

And whereas an emergency has arisen which makes it expedient to provide that such trials shall be held in the manner and by the tribunals hereinafter provided;

Now, therefore, the Governor General in exercise of the power conferred by Section 72 of the Government of India Act, 1915, is pleased to make and promulgate the following ordinance:-

1. Short Title and Commencement.

(1) This Ordinance may be called the Martial Law Ordinance, 1919.

(2) It shall come into operation at midnight between the 15th and the 16th April, 1919.

2. Trials under Regulation X of 1804 to be held by Commission

(1) Every trial held under the B.S.O.R., 1804 (hereinafter called the said Regulation) shall, instead of being held by a court martial, be held by a commission consisting of 3 persons appointed in this behalf by the local government.

(2) The local government may appoint as many commissions for this purpose as it may deem expedient.

(3) At least two members of every such commission shall be persons who have served as Sessions Judges or Additional Sessions Judges for a period of not less than three years, or persons qualified ~~for~~ under Section 101 of the Government of India Act, 1915, for appointment as Judges of a High Court. The local Government shall nominate one of the members of the Commission to be President thereof.

3. Convening authority.

A commission shall be convened by the local government or by such officer as the local government may authorise in this behalf.

4. Powers and Procedure of Commissions

A commission shall have all the powers of a general court martial ~~in~~ under the Indian Army Act, 1911, and shall, subject to the provisions of this Ordinance, in all matters follow so far as may be the procedure regulating trials by such courts martial prescribed by or under the said Act:

Provided that where, in the opinion of the convening authority, a summary trial is necessary in the interests of the public safety, such authority may direct that the commission shall follow the procedure prescribed for a summary general court martial by or under ~~the said~~ the said Act, and the commission shall, so far as may be and subject to the provisions of this Ordinance, follow such procedure accordingly:

Provided further, that Sections 78, 80 and 82 of the said Act shall not apply to any trial under this Ordinance.

5. ~~The finding~~ Confirmation of finding and sentence unnecessary
The finding and sentence of a commission shall not be subject to confirmation by any authority.

6. Saving of Proceedings of Courts Martial already begun
Nothing in this Ordinance shall affect any trial held or begun to be held by court martial under the said Regulation prior to the commencement of this Ordinance.

7. Retrospective Effect
Save as provided by Section 6, the provisions of this Ordinance shall apply to all persons referred to in the said Regulation who are charged with any of the offences therein described, committed on or after 13th April, 1919.

Chemsford,
Viceroy and Governor-General.

Appendix II

ACT NO. XXVII of 1919

25 SEPTEMBER, 1919

An Act to indemnify officers of Government and other persons in respect of certain acts done under martial law, and to provide for other matters in connection therewith.

Whereas owing to the recent disorders in certain districts in the Punjab and in other parts of India, martial law has been enforced;

And whereas it is expedient to indemnify officers of government and other persons in respect of acts, matters and things ordered or done or purporting to have been ordered or done for the purpose of maintaining or restoring order, provided that such acts, matters or things were ordered or done in good faith and in a reasonable belief that they were necessary for the said purposes;

And whereas certain persons have been convicted by courts and other authorities constituted and appointed under martial law, and it is expedient to confirm and provide for the continuance of certain sentences passed by such courts or authorities

It is hereby enacted as follows:-

1. Short title. This Act may be called the Indemnity Act, 1919.
2. Indemnity of Government officers and other persons for certain acts. No suit or other legal proceedings whatsoever, whether civil or criminal, shall lie in any court of law against any officers of government, whether civil or military, or against any other person acting under the orders of any such officer for or on account of

or in respect of any act, matter or thing ordered or done or purporting to have been ordered or done for the purpose of maintaining or restoring order in any part of British India where martial law was enforced, on or after the 30th of March, 1919, and before the 26th of August, 1919, by any such officer or person; provided that such officer or person has acted in good faith and in a reasonable belief that his action was necessary for the said purposes;

And if any such proceeding has been instituted before the passing of this Act it is hereby discharged.

3. For the purposes of Section 2 a certificate of a Secretary to Government that any act was done under the orders of an officer of Government shall be conclusive proof thereof, and all action taken for the aforesaid purposes shall be deemed to have been taken in good faith and in a reasonable belief that it was necessary therefor unless the contrary is proved.

4. Confirmation continuance of martial law sentences

Every person confined under and by virtue of any sentence passed by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall be deemed to have been lawfully confined and shall continue liable to confinement until the expiration of such sentence or until released by the Governor-General in Council as otherwise discharged by lawful authority.

5. Compensation in respect of loss attributable to certain acts.

When under martial law the property of any person has been taken or used

by any officer of Government, whether civil or military, the Governor-General in Council shall pay to such person reasonable compensation for any loss immediately attributable to such taking or using, to be assessed upon failure of agreement by a person holding judicial office not inferior to that of a District Judge to be appointed by the Government in this behalf.

6. Savings. Nothing in the Act shall -

a) apply to any sentence passed or punishment inflicted by or under the orders of any commission appointed under the Martial Law Ordinance, 1919

b) be deemed to bar a full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in or to affect any question or matter to be decided therein, or

c) prevent the institution of proceedings by or on behalf of the government against any person in respect of any matter whatsoever.

APPENDIX III

ORDINANCE NO. II OF 1921

26th August, 1921

An Ordinance to provide for the proclamation of Martial Law, to empower military authorities to make regulations for administering it, and to provide for other matters connected therewith.

Whereas an emergency has arisen which makes it necessary to provide for the proclamation of Martial Law, to empower military authorities to make regulations and issue orders to provide for the public safety and the maintenance and restoration of order, to authorise the trial of certain offences by Special Courts constituted under this ordinance, and to provide for other matters connected with the administration of Martial Law;

Now, therefore, the Governor-General, in exercise of the powers conferred by Section 72 of the Government of India Act, is pleased to make and promulgate the following Ordinance:-

1. This Ordinance may be called the Martial Law Ordinance, 1921.
2. Martial Law shall be in force and the provisions of this Ordinance shall apply in the area which is specified in the schedule and in such other areas as the Governor-General-in-Council may, by notification in the Gazette of India, direct, and in all such areas Martial Law shall be proclaimed by such means and in such manner as the Local Government may direct; and shall remain in force in any such area until withdrawn by the Governor-General-in-Council by notification in the Gazette of India, whereupon the provisions of this Ordinance shall cease to apply in such area;

Provided that no failure to comply with any directions of the Local Government as to the manner of proclamation in any area shall invalidate anything done in the administration of Martial Law in pursuance of this Ordinance in that area:

Provided further that the validity of any sentences passed, or of anything already done or suffered, or any liability incurred or indemnity granted in accordance with the provisions of this Ordinance shall not be affected by reason only of the fact that this Ordinance has ceased to be in force.

3. Administration of Martial Law: In any area in which Martial Law is for the time being in force, the Commander-in-Chief in India or an Officer not below the rank of Major-General empowered by him in this behalf, shall appoint one or more military officers, not being lower in rank than a Lieutenant-Colonial, to be Military Commanders to administer Martial (any such officer being hereinafter referred to in this Ordinance as "the Military Commander"), and the Military Commander shall exercise his powers in respect of such area or such part thereof (hereinafter referred to as an "administration area") as the appointing authority may direct.

4. Regulations: (1) Subject to the provisions of this Ordinance, the Military Commander shall have power to make regulations to provide for the public safety and the maintenance and restoration of order and as to the powers and duties of military officers and others in furtherance of that purpose.

(2) Such regulations may provide that any contravention thereof, or of any order issued thereunder or supplementary thereto, shall be punishable with any punishment authorised by any law in force in any

part of British India, and any such contravention shall, for the purpose of this Ordinance, be deemed to be an offence against a regulation or an order, as the case may be.

(3) The power to make regulations shall be subject to the following conditions, namely:-

(i) in making any regulation the Military Commander shall interfere with the ordinary avocations of life as little as may be consonant with the exigencies of the measures which he deems to be required to be taken for the purposes of Martial Law;

(ii) before making any regulation the Military Commander shall, if possible, consult the Senior Civil Officer in direct charge of the administration area in which he exercises power, but shall not be bound to follow his advice; and

(iii) the penalty, if any, for the contravention of a regulation shall be specified therein.

(4) The Military Commander shall cause any regulation made by him to be published in such manner as he thinks best fitted to bring it to the notice of those affected, and shall transmit through the normal channel a copy of every regulation so made to the Commander-in-Chief in India.

(5. Martial Law Orders: (1) The Military Commander may, by order in writing, empower any Magistrate or any military officer of seven years' service not below the rank of a Captain to make Martial Law Orders in any part of the administration area for the purpose of supplementing the regulations in that area, and the punishment for the contravention of any such Order shall be that specified in the regulations for the contravention of a Martial Law Order;

Provided that no Order shall be made which is inconsistent with the regulations.

(2) Every Magistrate or officer making a Martial Law Order under sub-section (1) shall cause the same to be published in such manner as he thinks best fitted to bring it to the notice of those affected.

(3) A copy of every such Order shall, as soon as may be, be submitted to the Military Commander who shall have power to add to, modify or rescind any such Order in such way as he thinks fit.

(4) Where a Military Commander has under sub-section (3) added to, modified or rescinded any such Order, he shall forthwith communicate the fact to the Magistrate or officer who made the Order, and such Magistrate or officer shall thereupon cause to be published in the manner hereinbefore mentioned the Order as so added to or modified, or the fact that the Order has been rescinded, as the case may be.

6. Courts under the Ordinance: (1) Summary courts of criminal jurisdiction may be constituted for the purposes of this Ordinance in any administration area in the manner hereinafter provided.

(2) The Military Commander may, by general or special order in writing, empower any Magistrate appointed under the provisions of the Code of Criminal Procedure, 1898, to exercise the powers of a Summary Court.

7. Limitation of Jurisdiction of Summary Courts. No Summary Court shall try any offence unless such offence was committed:-

(a) in the administration area in which such Court was constituted, and

(b) after such date (whether before or after the date of the proclamation of Martial Law in the area) as the Governor-General-in-Council may, in respect of such area, by notification in the Gazette of India, direct in this behalf.

8. Trial of Offences against regulations or Martial Law Orders.

(1) Every offence against a regulation or a Martial Law Order which is triable by a Summary Court shall be tried by such court, unless the Military Commander directs that it be tried by the ordinary Criminal Courts.

(2) The ordinary Criminal Courts are hereby empowered to try any offence in respect of which a Military Commander has made a direction under sub-section (1) and any offence against a regulation or Martial Law Order which is not triable by a Summary Court.

(3) Contraventions of any regulation or order made or issued in any area, after the date notified in respect of that area by the Governor-General-in-Council under Clause (b) of Section 7 and prior to the enforcement of Martial Law by or under this Ordinance in that area, by any officer acting in the exercise of military control for the purpose of providing for the public safety of the maintenance or restoration of order - shall be deemed to be offences against a regulation or a Martial Law Order in force in that area under this Ordinance, and shall be triable and punishable as if any sentence authorised by any such aforesaid regulation under this Ordinance.

9. Trial of offences connected with events necessitating Martial Law.

(1) Subject to the provisions of Section 7, offences, other than offences of the kind referred to in Section 8, connected with the events which have necessitated the enforcement or continuance of Martial Law, or any class of such offences, may, if the Military Commander by general or special order so directs, be tried by Summary Courts.

(2) If any question arises whether or not an offence is an offence of the nature described in sub-section (1), the decision of the Summary

Court shall be conclusive on the point, and such decision shall not be questioned in any Court.

(3) The Military Commander or any authority empowered by him in this behalf may, by a general or special order, give directions as to the distribution among the Summary Courts of cases to be tried by them under Section 8 of this section.

10. Trial of Other Offences. Save as otherwise provided in this Ordinance, all offences shall be dealt with by the ordinary Criminal Courts exercising jurisdiction in the administration area in the ordinary course of law.

11. Jurisdiction of ordinary Civil Courts. The ordinary Civil Courts shall continue to exercise civil jurisdiction in the areas in which Martial Law is in force by or under this Ordinance, provided that no Civil Court shall exercise any jurisdiction by way of interference with any regulation or Martial Law Order made under this Ordinance.

12. Procedure of Summary Courts. In the trial of any case a Summary Court shall, as far as possible, follow the procedure laid down in the Code of Criminal Procedure, 1898, for the trial of warrant-cases, and shall have all the powers conferred by the said Code on a Magistrate in regard to the issue of processes to compel appearance and to compel the production of documents and other moveable property. Provided that the Court shall not be required to record more than a memorandum of the evidence or to frame a formal charge:

Provided further that, in the trial of any offence punishable with imprisonment for a term not exceeding one year, the Court may follow the procedure for the summary trial of cases in which an appeal laid down in Chapter XXII of the said Code.

13. Sentences by Summary Courts. Summary Courts may pass any sentence authorised by law or by regulations under this Ordinance provided that such Courts shall not pass a sentence of imprisonment for a term exceeding two years, or of fine exceeding one thousand rupees.

14. Jurisdiction of Summary Courts. (1) No person shall be tried by a Summary Court for an offence which is punishable with imprisonment for a term exceeding five years.

(2) If a Summary Court is of opinion that the offence disclosed is one which it is not empowered to try, it shall send it for trial to an ordinary Criminal Court having jurisdiction.

(3) If a Summary Court is of opinion that an offence which it is empowered to try should be tried by an ordinary Criminal Court, or that it requires a punishment in excess of that which it is empowered to inflict, it shall stay proceedings and report the case for the orders of the Military Commander, who may direct that the case shall be tried by a Summary Court, or may send it to an ordinary Criminal Court having jurisdiction.

15. Legal Practitioners. Every person accused of an offence before a Summary Court shall be entitled to be defended by a legal practitioner;

Provided that the Court shall not be required to grant an adjournment for the purpose of securing the attendance of a legal practitioner if, in the opinion of the Court, such adjournment would cause unreasonable delay in the disposal of the case.

16. Exclusion of interference of Other Courts. (1) Notwithstanding the provisions of the Code of Criminal Procedure, 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no

appeal from any order or sentence of a Summary Court, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Summary Court, or to make any order under Section 491 of the Code of Criminal Procedure, 1898, or have any jurisdiction of any kind in respect of any proceedings of a Summary Court.

(2) The power of the Governor-General-in-Council or the Local Government to make order under Section 401 of Section 402 of the Code of Criminal Procedure, 1898, shall apply in respect of persons sentenced by Summary Courts.

17. Limitation of power of Summary Court to whip. Notwithstanding anything contained in sub-section 2 of Section 4, no Summary Court shall pass a sentence of whipping, for any offence against a regulation or Martial Law Order except where the offender has in the commission of the offence used criminal force within the meaning of the Indian Penal Code.

18. Execution of sentences of whipping. In the execution of any sentence of whipping passed by a Summary Court, the provisions of sub-section (2) of Section 392 and the provisions of Sections 393 and 394 of the Code of Criminal Procedure, 1898, shall apply, and every such sentence shall, as far as possible, be carried out in a place to which the public shall not be admitted.

19. Offence defined. Unless there is anything repugnant in the subject or context, the word "offence" shall be deemed for the purposes of this Ordinance and of Sections 401 and 402 of the Code of Criminal Procedure, 1898, to include an act which is, or which under the provisions of this Ordinance is deemed to be, an offence against a regulation or a Martial Law Order.

20. Saving. Nothing in this Ordinance shall be construed as in derogation of any powers for the maintenance of law and order exercisable by the Governor-General-in-Council or any other authority.

21. Validation of Martial Law Sentences prior to proclamation. Any sentence passed in any area, after the date notified in respect of that area by the Governor-General-in-Council under Clause (b) of Section 7 and prior to the enforcement of Martial Law by or under this Ordinance in that area, in respect of any contravention of a regulation or order made or issued within the same period by any officer acting in the exercise of military control for the purpose of providing for the public safety or the maintenance or restoration of order shall be deemed to be as valid as if it were a sentence passed under this Ordinance in respect of an offence against a regulation or a Martial Law Order in force in that area under this Ordinance.

22. Proceedings not invalidated by certain irregularities. No sentence, finding or order passed by a Summary Court shall be invalid by reason only of any error, omission or irregularity has in fact occasioned a failure of justice.

23. Protection of bona fide action. No suit, prosecution or other legal proceeding whatsoever shall lie against any person for or on account of or in respect of any act, matter or thing ordered or done, or purporting to have been ordered or done,

(a) under this Ordinance, or

(b) in the exercise of military control in any area for the purpose of providing for the public safety or the maintenance or restoration of order, after the date notified in respect of that area by the Governor-General-in-Council under Clause (b) of Section 7 and prior to the

enforcement of Martial Law by or under this Ordinance in that area.
Provided that such person has acted in good faith and in a reasonable belief that his action was necessary for the said purposes.

Provided further that nothing in this Section shall prevent the institution of proceedings by or on behalf of the Governor against any person in respect of any matter whatsoever.

Reading.

Viceroy and Governor-General.

Appendix IV

Ordinance No IV of 1930

15th May, 1930

An Ordinance to provide for the proclamation of martial law in the town of Sholapur and its vicinity, to empower military authorities to make regulations for administering it, and to provide for other matters connected therewith.

Whereas an emergency has arisen which makes it necessary to provide for the proclamation of martial law in the town of Sholapur and its vicinity, to empower military authorities to make regulations and issue orders to provide for the public safety and the restoration and maintenance of order, and to provide for other matters connected with the administration of martial law;

Now therefore, the Governor General, in exercise of the powers conferred by section 72 of the Government of India Act, is pleased to make and promulgate the following ordinance :-

1. Short Title and intent.

(1) This Ordinance may be called the Sholapur Martial Law Ordinance, 1930.

(2) It shall extend to the area comprised in the municipal limits of the town of Sholapur in the Bombay Presidency:

Provided that the Governor General in Council may, by notification in the Gazette of India, extend this Ordinance to any other area comprised in, or to the whole of, the District of Sholapur.

2. Proclamation of martial law - In any area to which this ordinance

extends martial law shall be in force and shall be proclaimed by such means and in such manner as the Local Government may direct; and shall remain in force in any such area until withdrawn by the Governor General in Council by notification in the Gazette of India, whereupon the provisions of this ordinance shall cease to apply in such area:

Provided that no failure to comply with any directions of the Local Government as to the manner of proclamation in any area shall invalidate anything done in the administration of martial law in pursuance of this Ordinance in that area:

Provided further that the validity of any sentences passed, or of anything already done or suffered, or any liability incurred or indemnity granted in accordance with the provisions of this ordinance, shall not be affected by reason only of the fact that this Ordinance has ceased to be in fact.

3. Administration of martial law. In any area in which martial law is for the time being in force, the Commander-in-Chief of India or the General Officer Commanding-in-Chief, the Command, shall appoint one or more military officers, not being lower in rank than a Lieutenant-Colonel, to be Military Commander to administer martial law (any such officer being hereinafter referred to in this Ordinance as "the Military Commander"), and the Military Commander shall exercise his power in respect of such area or such part thereof (hereinafter referred to as an "administration area") as the appointing authority may direct.

4. Regulations. (1) Subject to the provisions of this Ordinance, the Military Commander shall have power to make regulations to provide for

the public safety and the restoration and maintenance of order and as to the power and duties of military officers and others in furtherance of that purpose.

(2) Such regulations may provide that any contravention thereof, or of any order issued thereunder or supplementary thereto, shall be punishable with any punishment authorised by any law in force ~~in~~ any part of British India, and any such contravention shall, for the purposes of this Ordinance, be deemed to be an offence against a regulation or an order as the case may be.

(3) The power to make regulations shall be subject to the following conditions, namely :-

(i) in making any regulation the Military Commander shall interfere with the ordinary avocations of life as little as may be consonant with the exigencies of the measures which he deems to be required to be taken for the purposes of martial law.

(ii) before making any regulation the Military Commander shall, if possible, consult the senior civil officer in direct charge of the administration area in which he, exercises power, but shall not be bound to follow his advice; and

(iii) the penalty, if any, for the contravention of a regulation shall be specified therein.

(4) The Military Commander shall cause any regulation made by him to be published in such manner as he thinks best fitted to bring it to the notice of those affected, and shall transmit through the normal channel a copy of every regulation so made to the Commander-in-Chief in India.

5. Martial Law order. The Military Commander may, by order in writing, empower any Magistrate or any military officer of seven years' service, not below the rank of a captain, to make martial law order in any part of the administration area for the purpose of supplementing the regulations in that area, and the punishment for the contravention of any such order shall be that specified in the regulations for the contravention of a martial law order:

Provided that no order shall be made which is inconsistent with the regulations.

(2) Every Magistrate or Officer making a martial law order under sub-section (i) shall cause the same to be published in such manner as he thinks best fitted to bring it to the notice of those affected.

(3) A copy of every such order shall, as soon as may be, be submitted to the Military Commander, who shall have power to add to, modify or rescind any such order in such way as he thinks fit.

(4) Where a Military Commander has added to, modified or rescinded any order under sub-section (3), he shall forthwith communicate the fact to the Magistrate or officer who made the order, and such Magistrate or officer shall thereupon cause to be published in the manner hereinbefore mentioned the order as so added to or modified, or the fact that this order has been rescinded, as the case may be.

6. Offences. (1) No person shall -

(a) communicate to the enemy, or

(b) with the intention of communicating it to the enemy, collect publish or attempt to elicit, any information with respect to the movements, numbers, description, condition or disposition of any of His Majesty's forces or any police force engaged in

administering martial law or in restoring or maintaining order, or with respect to the plans or conduct or supposed plans or conduct of any military operations by any such forces, or with respect to any works or measures undertaken for, or connected with or intended for, the defense of any place.

(2) No person shall commit any act which is calculated to mislead or hamper the movements or imperil the success of any operations of His Majesty's forces or any police force engaged in administering martial law, or in restoring or maintaining order.

(3) Any person who contravenes the provisions of subsection (1) or sub-section (2) shall be deemed to have committed an offence under section 121 of the Indian Penal Code.

(4) Any person who voluntarily assists or relieves with money, victuals or ammunition, or knowingly harbours, protects or conceals any enemy, shall be punishable with rigorous imprisonment which may extend to ten years, or with fine, or with both.

Explanation - for the purposes of this section, the expression "enemy" means any mutineers, rebels or rioters against whom operations are being carried out by His Majesty's forces or the police for the purpose of restoring or maintaining order in any area in which martial law is in force by or under the provisions of this ordinance.

(7) Jurisdiction of ordinary Criminal Courts - All offences punishable under this Ordinance shall be dealt with by the ordinary Criminal Courts exercising jurisdiction in the administration area, in the ordinary course of law.

(8) Limitation of power to whip. Notwithstanding anything contained in

sub-section (2) of section 4, no Court shall pass a sentence of whipping for any offences against a regulation or martial law order except where the offender has, in the commission of the offence, used criminal force within the meaning of the Indian Penal Code

9. Jurisdiction of ordinary civil courts. The ordinary civil courts shall continue to exercise civil jurisdiction in the areas in which martial law is in force by or under this Ordinance:

Provided that no civil courts shall exercise any jurisdiction by way of interference with any regulation or martial law order made under this Ordinance.

10. Validation of regulations and orders made before proclamation of martial law. Contraventions of any regulation or order, made or issued in any administration area on or after the 12th day of May 1930, and prior to the proclamation of martial law in such area under section 2, by any officer of military control for the purpose of providing for the public safety or the restoration or maintenance of order, shall be deemed to be offences against a regulation or a martial law order in force in that area under this ordinance, and shall be triable and punishable as if any sentence authorised by any such aforesaid regulation or order were a sentence authorised by a regulation under this Ordinance.

11. Validation of martial law sentences prior to proclamation. Where, on or after the 12th day of May, 1930, and prior to the proclamation of martial law under section 2, in any administration area, any sentence has been passed by any officer acting in the exercise of military control for the purpose of providing for the public safety or the restoration or maintenance of order in respect of any contravention of a regulation or order made or

issued within this same period by any such officer, such sentence shall be deemed to be as valid as if it were a sentence passed under this Ordinance in respect of an offence against a regulation or a martial law order in force in that area under this Ordinance.

12. Protection of bona fide action. No suit, prosecution or other legal proceeding whatsoever shall lie against any person for, or on account of, or in respect of, any act, matter of thing ordered or done, or purporting to have been ordered or done.

(a) under this ordinance, or

(b) in the exercise of military control in any area for the purpose of providing for the public safety or the restoration or maintenance of order, on or after the 12th day of May, 1930, and prior to the proclamation of martial law in such area under section 2:

Provided that nothing in this section shall prevent the institution of proceedings by or on behalf of the Government against any person in respect of any matter where such person has not acted in good faith and a reasonable belief that his action was necessary for the aforementioned purposes.

13. Saving. Nothing in this Ordinance shall be construed as in derogation of any powers for the maintenance of law and order exercisable by the Governor General in Council or any other authority .

Irwin

Viceroy and Governor General

Appendix V

Report of the Commission on the Featherstone Riots (1893)

Employment of Troops in Aid of the Civil Power

Requisition for Intervention by Troops

4. The primary obligation for the preservation of order and for the suppression of disturbances rests with the civil authority. The civil authority should only requisition troops when satisfied that it is or will be impossible to deal with the situation which has developed, or is immediately apprehended, by means of all the resources of the civil power, that is to say, the local police, supplemented by any additional police that can be procured from elsewhere or by any police reserves or special constabulary that may be available.

A military commander who receives a requisition for troops from a distance is bound to comply if he is not in full possession of the facts. If, on arrival, the magistrate demands immediate intervention before the commander has had time to investigate for himself, he must intervene and he would be protected by the law. If, on arrival, a commander has time to investigate, he must do so, and acquaint himself with the facts and judge for himself before he intervenes. A commander on the spot, while attaching great weight to the opinion of the magistrate, must himself decide whether military intervention is necessary to deal with the circumstances in which he has been requisitioned.

Responsibility between Civil and Military Authority

5. There remains to be considered on whom, after a decision to take action has been made, the responsibility rests in the case of the employment of troops in the suppression of disturbances. As stated in paragraph 4, the primary duty of preserving public order rests with the civil authority. A commander, therefore, in all cases where it is practicable, should place himself under the direction of a magistrate.

The duties of a magistrate do not, however, impose upon him a knowledge of the weapons at the disposal of the troops, or of the effects of those weapons; he may not be, therefore, the best judge as to the degree of force to be employed by the soldiers in the particular circumstances for which he desires and requests their intervention. A magistrate, therefore, if he acts with discretion, will necessarily defer to the opinion of the commander on military matters, particularly as to the degree of force to be used. The primary responsibility, however, remains with the magistrate, and if he is on the spot, it is his duty to request the commander "to take action" when the civil resources at his disposal are insufficient to deal with the circumstances which present themselves.

On the other hand, a commander will not be performing his duty if, from fear of responsibility, he takes no action and allows outrages to be committed which it is in his power to check, merely on the ground that there is no magistrate to direct him to take action.

If the magistrate and the commander are acting together, the

obligation lies on the magistrate to request the commander to take action, but the action to be taken, i.e. the degree of force required in the circumstances, must be judged by the commander; the latter would incur considerable responsibility if he were to fire without a request to take action from the magistrate or if he were to refuse to fire when requested to do so, but circumstances which he sees before him might justify a commander in firing, or not firing, notwithstanding the request which he receives from the magistrate. The commander must judge of the degree of force to be employed, and it is his duty to fire if he cannot otherwise stop the violence which is being committed before him. He must decide whether it is necessary to fire or not, and is responsible for his action.

Quoted from the British Manual of Military Law (1951) Part II, Section V, at pp.2-3.

Appendix VI

Ordinance II of 1953

Martial Law (Indemnity) Ordinance, 1953

An Ordinance to indemnify servants of the Crown and other persons in respect of acts done under martial law and to provide for certain other matters in connection with the administration of martial law (9th May, 1953).

Whereas an emergency has arisen which makes it necessary to indemnify servants of the Crown and other persons in respect of acts done under martial law, and to provide for certain other matters in connection with the administration of martial law;

Now, therefore, in exercise of the powers conferred by Section 2 of the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:-

1. Short title, extent and commencement

(1) This Ordinance may be called the Martial Law (Indemnity) Ordinance, 1953.

(2) It extends to all the Provinces and the capital of the Federation.

(3) It shall come into force at once.

2. Definition In this Ordinance -

(1) "Martial law area" means the city of Lahore as defined in the City of Lahore Corporation Act, 1941 (Punjab Act XV of 1941) the Lahore cantonment.

(2) "Martial law period" means the period beginning on the 6th day of March, 1953, and ending on such day as the Central Government may by notification in the Official Gazette declare.

3. Indemnity of servants of the Crown and other persons for certain acts.

(1) No suit, prosecution or other legal proceeding shall lie in any court against any servant of the Crown for or on account of or in respect of any act ordered or done by him or purporting to have been ordered or done by him in the martial law area during the martial law period for the purpose of maintaining or restoring order or of carrying into effect any regulation, order or direction issued by any authority responsible for the administration of martial law in the said area to which he was subordinate; and no suit, prosecution or other legal proceeding shall lie in any court against any other person for and on account of or in respect of any act done or purporting to have been done by him under any order of a servant of the crown given for any such purpose as aforesaid.

Provided that the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby.

(2) For the purposes of this section it shall be conclusive proof that an act was done under an order of a servant of the Crown given for one of the aforesaid purposes if the Central Government, in the case of an officer employed in connection with the affairs of the Central

Government, or the Provincial Government, in the case of an officer employed in connection with the affairs of a Provincial Government, so certifies; and an act shall be deemed to have been done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby except with the previous sanction -

a) where the act complained of was ordered or done by a servant of the Crown employed in connection with the affairs of the Central Government, of the Central Government, and

b) where the act complained of was ordered or done by a servant of the Crown employed in connection with the affairs of Provincial Government, of the Provincial Government.

5. Confirmation of order for seizure or destruction of property.

Where in the course of operations conducted in the martial law area during the martial law period property whether movable or immovable has been seized, confiscated, destroyed or damaged by or under the directions of a servant of the Crown acting under martial law, such seizure, confiscation, destruction or damage shall be deemed to have been lawfully ordered and authorized, and no claim shall be maintained in any court in respect of any such property for the restoration thereof or for compensation for any loss sustained in consequence of the seizure, confiscation, destruction or damage thereof.

6. Validity of sentences passed by martial law courts

All sentences passed during the martial law period by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall be deemed to have been lawfully

passed, and all sentences executed according to the terms thereof shall be deemed to have been lawfully executed.

7. Confirmation and continuance of martial law sentences of confinement

(1) Every person confined under and by virtue of a sentence passed by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall continue liable to confinement until the sentence, reduced by remissions, if any, earned under the rules applicable to the serving of such sentence, is served, or until he is released by order of the Central Government.

(2) The provisions of Chapter XXIX of the Code of Criminal Procedure, 1898, shall not apply to any sentence or confinement referred to in this section.

8. Application of Sections 6 and 7 to certain trials under martial law

The provisions of Sections 6 and 7 apply to sentences passed during the martial law period by a court or other authority constituted or appointed under martial law notwithstanding that such court or authority may have held the whole or a part of its sittings outside the martial law area, or notwithstanding that the offence or a part of the offences for which the accused person was tried and convicted may have been committed before the beginning of the martial law period.

9. Saving

Nothing in this Ordinance shall prevent the institution of proceedings by or on behalf of Government against any person in respect of any matter whatsoever.

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